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No. 09-560

In The

Supreme Court of the United States

WARDEN TERRY CARLSON,

Petitioner,

v.

ORLANDO MANUEL BOBADILLA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), this Court held that "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." The Court pointed to various formulations of what constitutes "testimonial" statements, but did not define the concept. Since that time, lower courts have been divided on how to define "testimonial" and how to apply *Crawford* to other factual scenarios. In this case, in an opinion issued shortly after *Crawford* was decided, the Minnesota Supreme Court held that a statement by a three-year-old child to a child-protection worker was not testimonial because the primary purpose of the interview was to protect the child's health and welfare. The Eighth Circuit granted habeas relief. The questions presented are:

1. Whether the Eighth Circuit exceeded its authority under 28 U.S.C. § 2254(d)(1) (AEDPA), when it held that the Minnesota Supreme Court's ruling that the statement by an abused child to a child-protection worker was not testimonial was "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."

2. Whether the Eighth Circuit exceeded its authority under AEDPA when it made factual determinations contrary to those made by the Minnesota Supreme Court, failed to review the actual interview of the child, and rejected the state supreme court's interpretation of the state statute under which the interview was conducted.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Warden Terry Carlson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The published decision of the Eighth Circuit (App. 1-18) appears in the Federal Reporter as *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009). The published decision of the district court (App. 19-54) is officially reported at 570 F. Supp. 2d 1098 (D. Minn. 2008). The magistrate's decision (App. 55-91) is unreported. The Minnesota Court of Appeals' decision is officially reported as *State v. Bobadilla*, 690 N.W.2d 345 (Minn. Ct. App. 2004). The Minnesota Supreme Court's published decision (App. 92-129) is located at 709 N.W.2d 243 (Minn. 2006). This Court denied Bobadilla's petition for a writ of certiorari on direct appeal (App. 130) at *Bobadilla v. Minnesota*, 549 U.S. 953 (2006).

JURISDICTION

The Eighth Circuit entered its judgment on August 6, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 28 U.S.C. § 2254, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall

> have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Relevant provisions of Minnesota's statute regarding reporting of maltreatment of minors, Minn. Stat. § 626.556 (2002), are included in the appendix at App. 131-44.

INTRODUCTION

In *Crawford v. Washington,* 541 U.S. 36, 68 n.10 (2004), this Court acknowledged that its refusal to articulate a comprehensive definition of "testimonial" would cause interim uncertainty. Indeed, since *Crawford*, lower courts have struggled with how to define "testimonial" and how to apply *Crawford* in cases involving factual scenarios that differ from the scenario present in *Crawford*. Notwithstanding the uncertainty surrounding this issue, and the absence of any decision by this Court involving a child's statement to a social worker, the Eighth Circuit held that the law governing whether a child's statement is testimonial is "clearly established" and that the Minnesota Supreme Court "unreasonably appl[ied]" that clearly established law. In reaching that conclusion, the Eighth Circuit failed to abide by the restrictions on habeas relief imposed by Congress in AEDPA. The Eighth Circuit also failed to abide by AEDPA's requirement that federal habeas courts presume that state court factual findings and constructions of state law are correct.

The Eighth Circuit's decision is contrary to the principles of comity, finality and federalism, which AEDPA was designed to promote. This case, therefore, is about ensuring that federal courts of appeal remain faithful to the limits Congress imposed on their authority in AEDPA. Whereas some circuits have heeded this Court's admonitions regarding the limits on habeas relief, the Eighth Circuit and several other circuits persist in granting habeas relief even absent "clearly established" law.

STATEMENT OF THE CASE

A. Factual Background.

In the spring of 2003, three-year-old TB lived with his mother, Melissa, but saw his father, Miguel, every other weekend (JA404-05, 435-36).[1] Miguel lived in the home of his mother and step father (JA434-35). Bobadilla, Miguel's brother, also lived there (*Id.*).

On May 2, 2003, Melissa took TB to spend the weekend with his father (JA404-05). TB and his father spent a lot of the weekend there, either in the living room or in Miguel's upstairs bedroom (JA437). There were times during the weekend when Miguel left TB alone in a room (JA440-54). Miguel saw

[1] "JA" refers to the Joint Appendix filed in the Eighth Circuit.

Bobadilla walking in the hallway while Miguel was washing up in the bathroom (JA453-54). By Sunday, May 4, TB was acting strangely and wet himself three times that day (JA442).

That night, after Melissa picked TB up and while preparing him for bed, she noticed that the area around his anus was very red and irritated (JA405-09, 441). When she mentioned it to TB, he appeared nervous and began playing with his hair (JA405). Melissa reassured TB that he could tell her anything and again asked him what happened (*Id.*). TB then told his mother that "his Uncle Orlando [Bobadilla] had put his finger in his booty," TB's term for his anus (JA387, 405-06). TB told his mother that he had asked Bobadilla to stop and that Bobadilla had said he was sorry (JA406).

TB's parents and grandmother then took him to the hospital, where he was examined in the emergency room (JA406-07, 413, 442-43). The doctor saw an abnormal erythema or redness around TB's rectum, which was consistent with the assault TB disclosed to his mother (JA414-17). The erythema was not a diaper rash, and the doctor did not see any ulcerations or lesions that would lead her to believe that TB had a chronic problem in that area of his body instead of suggesting that he was a possible assault victim (JA416-19).

A police officer, who was dispatched to the hospital on an assault report, initially met with the emergency room nurse and TB's parents (App. 95). The

officer forwarded his report to the investigations unit of the police department and to Kandiyohi County Family Service Department (App. 95). Several days later, on May 9, 2003, social worker Cherlynn Molden interviewed TB in the presence of police investigator Matthew Akerson at the law enforcement center (JA378-79, 390). This interview rests at the heart of the current dispute.

When police investigator Akerson was asked at trial how he became involved in the investigation in this case, he said: "We received a report from the Kandiyohi County Family Service Department of this alleged abuse. Cherlynn Molden had called me. We set up a time to interview the child, the victim in this case" (JA428). Molden testified that she became involved in TB's interview when Detective Akerson asked her to assist him in the interview (JA378). She said, "I wasn't involved in that part of the investigation, but he asked me to assist him" (*Id.*).

Molden had a difficult time getting in touch with TB's mother by telephone (JA399). When Molden finally connected with TB's mother, TB's mother brought him in that day for an interview (*Id.*). Detective Akerson and child-protection worker Molden walked TB and his parents to the "child friendly" interview room, explaining to TB that his parents would be waiting for him in the room next door (JA380). Detective Akerson was not in uniform (App. 95).

Molden sat across from TB with an easel between them; Detective Akerson sat opposite from the easel (JA378-79). The room contained a video camera, which was not visible to TB due to a two-sided mirror (JA378). Molden, a social worker who does "child-protection investigations," has been involved in approximately 250 investigations regarding sexual abuse of children (JA374-75). Molden was trained in the CornerHouse method, which is a style of interviewing specifically geared toward children who have been victims of sexual abuse (JA375-76). The CornerHouse method requires the interviewer to use non-leading questions in an attempt to elicit the child's own words (JA376). There are challenges in interviewing a three-year-old, such as a short attention span and an inability of a child to understand complex terms or questions (JA379).

During the course of the interview, Molden asked TB whether anyone had hurt his body, and TB replied, "Orlando [Bobadilla] did" (JA385). Molden asked him how Bobadilla had hurt his body, and TB replied, "he does stuff to my booty" (*Id.*). When Molden asked what Bobadilla had done to his booty, TB said that Bobadilla "put his finger in my booty" (*Id.*). Molden asked TB to point out his "booty" on the diagram, and he initially pointed in the general direction of the buttocks (JA387). Molden then had TB stand up and approach the diagram more closely and point more specifically (*Id.*). When TB did so, he pointed to the area of the anus and referred to that as "the booty" (*Id.*).

Molden asked TB where the incident occurred, and TB said that it happened in his father's room (*Id.*). Molden asked TB where his father was at the time, and TB said that his father had gone downstairs to get the "kitty" (JA388). TB also said "yeah" when asked if his father had seen the abuse happen (App. 97). Molden asked TB how many times it happened, and TB said "one time" while he was lying down (JA387-88). TB said Bobadilla touched him on the skin and said he was sorry (JA388). Molden closed the interview with TB with a safety message, discussing with him who he could tell if something like this happened again (JA389).

Although Detective Akerson was present during the interview with TB, the detective did not participate in it (App. 95).

B. Minnesota State Court Proceedings.

1. Minnesota District Court Proceedings.

Bobadilla was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Prior to trial, the state sought rulings concerning TB's competency to testify and the admissibility of several of TB's out-of-court statements, including TB's videotaped statement to Molden. The district court judge ruled that TB was not competent to testify, but that his

statement to child-protection worker Molden was admissible (JA97-308, 328-33).[2]

Molden testified at trial, and her videotaped interview of TB was played for the jury (JA374-400). Bobadilla testified that he never inserted his finger in TB's anal opening (JA473). He testified that he had been in TB's bedroom at Melissa's apartment sometime earlier and accidentally bit TB's ear while playing a game (JA473-74).

The jury found Bobadilla guilty of first-degree and second-degree criminal sexual conduct.

2. Decision of the Minnesota Court of Appeals.

While Bobadilla's appeal was pending, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). The Minnesota Court of Appeals held that under *Crawford*, the admission of TB's videotaped statement to the child-protection worker violated Bobadilla's Sixth Amendment confrontation rights. *Bobadilla*, 690 N.W.2d at 345.

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[2] The judge's decision was based on the reliability of the statement (JA328-33). *Crawford* had not been decided yet.

3. Decision of the Minnesota Supreme Court.

The Minnesota Supreme Court reversed (App. 92-129). The court recognized that *Crawford* bars "testimonial" out-of-court statements when the accused has not been afforded the opportunity for cross examination (App. 100). The issue was thus "whether TB's statements in the interview with the child-protection worker were 'testimonial' under *Crawford*" (App. 100). The Minnesota Supreme Court found that this Court "'refused to articulate a comprehensive definition' of testimonial statements," declined to choose among three formulations, and stated that the three formulations "'share a common nucleus,'" which includes, at a minimum, police interrogations (App. 101-02 (quoting *Crawford*, 541 U.S. at 51-53, 68 n.10)).

Given the absence of a definition of "testimonial" from this Court, the Minnesota Supreme Court looked to the concerns animating *Crawford* and concluded that the central considerations were the purpose of the statement from the perspective of both the declarant and the government questioner; if either is acting to a substantial degree to produce a statement for trial, the statement is testimonial (App. 102-03, 109-10). The court observed that this approach was consistent with that taken by numerous other courts (App. 104-06 (citing cases from 10 jurisdictions and noting that those jurisdictions have considered whether the declarant or questioner were giving or taking a statement with an eye toward trial)).

Recognizing that courts in several jurisdictions have held that statements of children in interviews conducted by social workers or police investigators are testimonial, the court found those cases distinguishable on their facts (App. 111-12 (citations omitted)). The court further noted that government questioners and declarants often have multiple purposes, and that "where preservation for trial is merely incidental to other purposes, . . . a statement will not be deemed testimonial" (App. 107).

Applying its test here, the Minnesota Supreme Court determined that neither TB nor Molden "were acting, to a substantial degree, in order to produce a statement for trial" (App. 112-13). The court found that the interview "was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child" (App. 115). Even if part of the purpose was to produce a statement for trial, that purpose was at best incidental to the main purpose of assessing and responding to any imminent risks to TB's health and welfare (App. 116). The court also determined that given TB's young age, it was doubtful that he understood his statements would be used at a trial (App. 116).

As further support for its conclusion, the court noted that the interview here was conducted pursuant to Minn. Stat. § 626.556, Minnesota's statutory scheme for reporting, investigating, and responding

to threats to children's health and welfare (App. 113). The statute requires "the local welfare agency," following a report of abuse, to "conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible" (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a) at App. 137-38)). And although the statute requires the welfare agency and law enforcement to "coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews," (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a) at App. 138)), the statute is not "designed with the express purpose of facilitating the creation of out-of-court statements for a future trial" (App. 114).

Finally, the Minnesota Supreme Court explained that some assessment interviews may produce testimonial statements, citing as an example an older child who understands the law-enforcement consequences of the statement "or an interview with more significant law-enforcement involvement [which] might both exhibit a greater purpose on the part of a declarant or government questioner to produce statements for use at a future trial" (App. 116). The court recognized that in a situation "tantamount to a 'police interrogation' under *Crawford*," the government questioner would be acting to a substantial degree to

produce a statement for trial (App. 112). The court found, however, that this was not such a case.

Justice Alan Page dissented and filed a separate opinion (App. 120-24).

4. Bobadilla's Petition for a Writ of Certiorari.

In his petition for certiorari in this Court on direct appeal, Bobadilla argued, "[t]his case necessitates a definitive ruling on the following *issue of first impression*: how this Court's decision in *Crawford* applies to a child victim's accusatory statement elicited during a child abuse forensic interview, where the child was too young to testify." (Pet. for Cert., No. 05-11698, at 2; emphasis added). He also argued that lower courts were "irreconcilably split" in considering the purpose of a forensic child abuse interview where the interview serves a dual purpose (*Id.* at 8). Bobadilla said *Crawford* left unresolved how to define whether a child's statement during a forensic interview was testimonial and that this issue was "unsettled" (*Id.* at 8, 12).

This Court denied Bobadilla's petition for certiorari on October 10, 2006 (App. 130).

C. Federal Habeas Corpus Proceedings.

1. Decision of the District Court.

Bobadilla filed a counseled petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United

States District Court for the District of Minnesota. He argued that the introduction of TB's videotaped statement at trial violated his right of confrontation and was contrary to *Crawford*, and that the Minnesota Supreme Court unreasonably applied *Crawford* (JA46-60, 97-105). Bobadilla further argued that under 28 U.S.C. § 2254(e)(1), there was "no factual finding, no presumption, and nothing to rebut." (JA105-09). He moved the court for an evidentiary hearing under 28 U.S.C. §§ 2246 & 2254(e)(2) (JA114-21).

Declining to adopt the Magistrate's Report and Recommendation to deny Bobadilla's petition, the district court granted habeas relief (App. 19-54). The district court conceded that the record before the federal court did not contain a transcript of the full interview of TB (App. 44 n.7). The state filed a motion to expand the record to include a copy of the videotape and/or a transcript of it (JA241-53), and simultaneously filed a motion to alter or amend judgment based upon review of the videotape (*Id.*). The district court denied both of the state's motions (JA254-59).

2. Decision of the Eighth Circuit.

The Eighth Circuit affirmed the grant of habeas relief, holding that it was "unreasonable" for the Minnesota Supreme Court not to conclude that the interview of TB was a form of "police interrogation" that, under *Crawford*, created a testimonial statement (App. 13). In the Eighth Circuit's view, every

interview conducted by a social worker under Minn. Stat. § 626.556 amounts to a police interrogation that produces a testimonial statement because the statute "mandates social workers and police officers [to] coordinate the planning and execution of their investigation. . . ." (App. 15). According to the Eighth Circuit, "even if a social worker is acting for a different purpose, the statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation" (App. 15). "Far from making such interviews unlike the police interrogation in *Crawford*, the statute mandates them to be the functional equivalent of such interrogations" (App. 15). The court therefore rejected the Minnesota Supreme Court's determination that the interview was conducted under Minn. Stat. § 626.556 "'for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child'" (App. 13-14 (quoting App. 115)).

On the facts of this case, the Eighth Circuit found that Molden's trial testimony revealed that "the interview was initiated by a police officer" and that Molden participated in the interview "for the purpose of the criminal investigation" (App. 11-12). In quoting Molden's testimony, the court of appeals inserted its own language: "'Detective Akerson from the Police Department asked me to assist him in interviewing [TB]. I wasn't involved in that part of the investigation [*that is, the criminal investigation*], but he

asked me to assist him'" (App. 3 (brackets added by Eighth Circuit; emphasis added)). The court did not explain why Molden's testimony could not be read as saying that she had not personally been interviewing witnesses to determine what steps were needed to protect TB's health and welfare (*i.e.*, the civil investigation).

The Eighth Circuit emphasized that "the interview was not conducted until five days after the abuse was first alleged, which indicates the purpose of the interview was to confirm a past allegation of abuse rather than to assess immediate threats to TB's health and welfare" (App. 12). The court did not explain why a civil investigation done for the purposes of protecting a child's health and welfare could not take place five days after abuse is alleged. The Eighth Circuit also determined that the federal district court did not "clearly err" in finding that Molden did not ask the type of questions expected if the purpose of the interview was to assess risks to TB's welfare (App. 14). In reaching that conclusion, the court did not address the state's argument that the federal district court could not make such a finding without having the videotaped interview or a transcript of it in its record.

In the end, the Eighth Circuit concluded that "[t]he only significant difference between the interview involved in the present case and the one held to be testimonial in *Crawford* is instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the

same" (App. 12). It was therefore "unreasonable for the Minnesota Supreme Court to conclude, even though the questioning was undertaken by a social worker, the statements made by TB during his interrogation were in any way different than the statements found to be testimonial in *Crawford*" (App. 13). Finally, the court found that the error in admitting TB's videotaped statement at trial was not harmless (App. 16-17).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit decided this case as if it were on direct appeal. In doing so, the court failed to properly apply the limitations imposed by Congress through AEDPA and the decisions of this Court interpreting AEDPA. Specifically, the Eighth Circuit's decision conflicts with AEDPA and this Court's precedents by treating *Crawford* as though it had "clearly established" the law with respect to whether and when statements made by young children to social workers are testimonial, and by concluding that the state court "unreasonably appl[ied]" *Crawford*. The Eighth Circuit also exceeded its authority under AEDPA by rejecting the state court's factual findings without a complete record and by adopting a different interpretation of a Minnesota statute than that adopted by the Minnesota Supreme Court.

The Eighth Circuit's decision undermines the finality of state court convictions that AEDPA sought

to protect. This Court has reversed numerous federal court of appeals decisions on that basis, but several circuits, including the Eighth Circuit, have not adhered to the AEDPA standards. In addition, the Eighth Circuit's decision directly conflicts with the Minnesota Supreme Court's decision, resulting in confusion in Minnesota on how child abuse cases should be handled and prosecuted. This Court should grant certiorari to ensure that federal habeas courts follow the limits imposed by Congress in AEDPA.

I. The Eighth Circuit Exceeded The Limits Of AEDPA When It Held That *Crawford* Clearly Established The Law With Respect To When Statements By Children To Social Workers Are Testimonial And When It Held The State Court Unreasonably Applied *Crawford*.

Congress enacted AEDPA "to advance the finality of criminal convictions," *Mayle v. Felix,* 545 U.S. 644, 662 (2005), and "to further the principles of comity, finality, and federalism." *Panetti v. Quarterman,* 551 U.S. 930, 945 (2007). Accordingly, this Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor,* 529 U.S. 420, 436 (2000). AEDPA provides "binding directions" to accord deference to state-court decisions, and creates a "high standard to be met" before a federal court may issue a writ of habeas corpus. *Uttecht v. Brown*,

551 U.S. 1, 10 (2007). The Eighth Circuit's decision in this case is contrary to the principles that Congress sought to further with the enactment of AEDPA.

A. In Concluding That *Crawford* Clearly Established The Law With Respect To A Young Child's Statement To A Child Protection Worker During A Dual-Purpose Interview, The Eighth Circuit's Decision Conflicts With AEDPA And This Court's Recent Decisions Interpreting AEDPA.

The "threshold question" under AEDPA is whether there is a rule of law that was "clearly established" at the time the state-court conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). "Clearly established" refers to the holdings, as opposed to the dicta, of this Court at the time of the relevant state-court decision. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (citing *Williams*, 529 U.S. at 412). When there is no holding by this Court on a particular issue, it cannot be said that the state supreme court unreasonably applied clearly established federal law. *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006); *Wright v. Van Patten*, 552 U.S. 120, ___, 128 S. Ct. 743, 746-47 (2008). "AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 277-78 (2007) (Roberts, C.J., dissenting).

Crawford does not "squarely address" the issue in this case and does not provide a "categorical answer" or "clear answer" to the issue presented to the Minnesota Supreme Court. *Crawford* expressly left open the question of whether statements are testimonial when given in contexts other than that of a *Mirandized* adult suspect during a police interrogation. This Court gave three alternative formulations of testimonial statements but did not adopt any particular formulation, *Crawford*, 541 U.S. at 51-52, refused to define "interrogation," *id.* at 53 n.4, and specifically stated that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Anticipating the situation that faced the Minnesota Supreme Court in this case, the Court explicitly acknowledged that its "refusal to articulate a comprehensive definition in this case will cause interim uncertainty." *Id.* at 68 n.10

Indeed, when the Minnesota Supreme Court decided this case, this Court had not yet issued its decision in *Davis v. Washington,* 547 U.S. 813, 822 (2006), which refined the concept of "testimonial" by holding that statements made in response to police interrogation "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." And, even after *Davis,* many questions about the scope of *Crawford* remain. *See* Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Pol'y

553, 573-74 (2007) (discussing the "wide range" of issues that need to be resolved, including the extent to which statements to government agents who are not law enforcement can be characterized as testimonial and the extent to which the age of the declarant can be considered). As Professor Friedman notes, "[w]ith respect to extremely young children, . . . there is a plausible argument that they may be incapable of being witnesses within the meaning of the Confrontation Clause." *Id.* at 574. With so many questions about what constitutes a testimonial statement still unanswered – even after further refinement in *Davis* – the Eighth Circuit's conclusion that *Crawford* clearly established the law with respect to the statements at issue is untenable.

For precisely these reasons, in his petition for certiorari on direct appeal, Bobadilla argued that the question presented was one of "first impression" and "unsettled" (Pet. for Cert., No. 05-11698, at 8, 12). He stated that *Crawford* left unresolved how to define whether a child's statement during a forensic interview was testimonial (*Id.*). Bobadilla's own argument in his petition verifies that there is no clearly established law regarding whether a child's statement to a child protection worker is testimonial.

Bobadilla also asserted in his petition for certiorari that lower courts were "irreconcilably split" in considering the purpose of a forensic child abuse interview where the interview serves a dual purpose. (*Id.* at 8). The Minnesota Supreme Court recognized that courts considering *Crawford* have utilized

different formulations of "testimonial" and have reached varying results (App. 106 n.3, 11-12 (citing, for example, *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004), *cert. denied*, 543 U.S. 1079 (2005), as a case concluding that the declarant's perspective is the dispositive factor in the testimonial analysis)). The state court also recognized that other jurisdictions had concluded that a child's statement to a social worker was testimonial (*see* App. 111 (citing, for example, *Snowden v. State*, 846 A.2d 36 (Md. Ct. Spec. App. 2004), *aff'd by,* 851 A.2d 596 (Md. 2004))). As this Court recognized in *Musladin*, 549 U.S. at 76-77, the different results of the lower courts further establish the lack of clearly established Supreme Court precedent. *See also Thompson v. Battaglia,* 458 F.3d 614, 619 (7th Cir. 2006) (holding that a lack of clearly established law is evident when there is a variety of practice among state and federal courts), *cert. denied,* 549 U.S. 1229 (2007).

The Eighth Circuit's grant of habeas relief, notwithstanding the absence of "clearly established Federal law, as determined by" this Court, runs afoul of this Court's recent decisions in *Musladin* and *Van Patten*. Those decisions stand for the proposition that a general principle derived from this Court's precedent does not constitute "clearly established" law under AEDPA when applied in a different factual context. *See Musladin,* 549 U.S. at 75-77 (holding that the general principle from prior decisions regarding the effect of state-sponsored courtroom practices was not clearly established with respect to spectators'

conduct); *Van Patten,* 128 S. Ct. at 746-47 (holding that prior precedents "do not clearly hold that counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence"). In *Van Patten,* this Court noted that its prior decisions did not "squarely address" the issue and did not provide a "categorical answer" or "clear answer" to the question presented. *Id.* at 746-47. The same is true here.

In this case, the general principle of *Crawford* regarding the Confrontation Clause's concern with testimonial statements does not amount to a declaration that a young child's statement to a child-protection worker during a dual-purpose interview produces a testimonial statement on par with the *Mirandized* interrogation at issue in *Crawford*. Like the general principles at issue in *Musladin* and *Van Patten*, the general principle of *Crawford* is not sufficient to meet the clearly-established-federal-law standard in this case. *Cf. House v. Hatch*, 527 F.3d 1010, 1017 n.5, 1022 (10th Cir. 2008) (holding that post-*Musladin*, "federal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts" and that the habeas petitioner must do more than identify a generalized legal principle to demonstrate the law is clearly established), *cert. denied*, 129 S. Ct. 1345 (2009); *Hill v. Wilson*, 519 F.3d 366, 368 (7th Cir.) (citing *Musladin* and *Van Patten* and stating, "[t]he Supreme Court has held that a right becomes 'clearly established' only when a course of decisions has

established how the Constitution's grand generalities apply to a class of situations"), *cert. denied*, 129 S. Ct. 200 (2008); *Rodriguez v. Miller*, 537 F.3d 102, 107 (2d Cir. 2008) (recognizing that *Musladin* requires courts to read Supreme Court holdings narrowly).

The Eighth Circuit is not alone in failing to heed this Court's pronouncements regarding AEDPA's meaning and application. For example, in *Spisak v. Hudson*, 512 F.3d 852, 854 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak*, 129 S. Ct. 1319 (2009), the Sixth Circuit held that *Musladin* did not affect its decision to grant habeas relief based on, *inter alia*, a purported violation of *Mills v. Maryland*, 486 U.S. 367 (1988). The court reached that conclusion even though *Mills* did not clearly establish that jury instructions in capital cases must expressly advise the jury that it can consider all mitigating circumstances, including mitigating circumstances not unanimously found by the jury to exist. Similarly, the Ninth Circuit in *Smith v. Curry*, 580 F.3d 1071, 1082 (9th Cir. 2009), granted habeas relief based on petitioner's claim that the trial judge's supplemental jury instruction coerced a verdict because the judge knew the identity of the holdout juror and suggested that the jury concentrate on certain evidence. The dissent recognized that this Court had clearly established that a defendant was entitled to an uncoerced jury verdict, "[b]ut I can find no clearly established federal law indicating that a trial judge may not comment on the evidence when he knows the numerical division of the jury, and no Supreme Court

holding requires a state court judge (when commenting on the evidence) to recite any and all evidence. . . . *Id.* at 1086-87 (Smith, J., dissenting).

By contrast, several circuits have faithfully applied *Musladin's* teaching. The Tenth Circuit recently rejected a habeas claim because no clearly established law dictated that the Confrontation Clause applies at capital sentencing proceedings. *Wilson v. Sirmons*, 536 F.3d 1064, 1111-12 (2008), *reinstated in part and remanded in part on other grounds by Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). Similarly, the First Circuit denied habeas relief where the petitioner argued that his confession during an interview transformed it into a custodial interrogation requiring a *Miranda* warning. *Locke v. Cattell*, 476 F.3d 46, 53-54 (1st Cir.), *cert. denied*, 128 S. Ct. 177 (2007). The court acknowledged that several state courts had concluded that an admission transforms an interview into a custodial interrogation, but found no clearly established law because this Court has not ruled on the issue. *Id.* And in *Richardson v. Quarterman*, 537 F.3d 466, 475-76 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1355 (2009), the Fifth Circuit held that this Court's decisions did not clearly establish that unconstitutional judicial bias existed where the judge's wife knew the deceased because that situation did not fall within any of the three categories of situations (*e.g.*, having a direct pecuniary interest in the case) where this Court has found recusal to be required.

This Court's intervention is needed to ensure that the federal courts of appeal uniformly adhere to AEDPA's requirement that habeas relief may be granted under 28 U.S.C. § 2254(d)(1) only when the state court misapplied a "clearly established" holding by this Court. *Crawford* did not specify how its general principle was to be applied outside the context of a *Mirandized* statement given by an adult suspect to the police. This Court, therefore, did not clearly establish what constitutes a testimonial statement in other contexts. AEDPA foreclosed a grant of habeas relief in this case.

B. Even If The Federal Law Was Clearly Established, The Writ Should Not Have Been Granted Because The Minnesota Supreme Court Did Not Unreasonably Apply *Crawford*.

A petitioner may receive habeas relief when the law is clearly established if the state court unreasonably applied the law. 28 U.S.C. § 2254(d)(1). Even if the federal court concludes that the state court decision erroneously applied clearly established federal law, the writ may only be issued if the application was objectively unreasonable. *Williams*, 529 U.S. at 411. "[T]he range of reasonable judgment can depend in part on the nature of the relevant rule." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The range may be narrow if the legal rule is specific, but when rules are more general, the meaning of such rules must emerge over time. *Id.* "The more general

the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.*; *see also Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009). Consistent with this principle, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

The Eighth Circuit did not give the leeway it was required to give to the Minnesota Supreme Court, given the many questions this Court left unanswered in *Crawford*. Instead, the Eighth Circuit "overruled" the Minnesota Supreme Court for holding a view different from its own on an issue where this Court's precedent is ambiguous. The Eighth Circuit appears to have rejected the substantial purpose test applied by the Minnesota Supreme Court to this dual-purpose interview. Examining Minn. Stat. § 626.556, the Eighth Circuit held that "even if a social worker is acting for a different purpose, the statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation" (App. 15). The court then concluded that the statute mandates child-protection interviews to be the "functional equivalent" of police interrogation (App. 15). This holding suggests that dual-purpose interviews always produce testimonial statements if *any* purpose is for law enforcement.

The Minnesota Supreme Court's substantial purpose test, however, was not an unreasonable application of *Crawford*. The Minnesota Supreme Court carefully and thoroughly analyzed *Crawford*. The court recognized that (1) under *Crawford*, at a minimum, testimonial statements include prior testimony and police interrogations; (2) this Court in *Crawford* declined to define "interrogation" because a more precise definition was not necessary in that case; and (3) as explained by *Crawford*, the Confrontation Clause protects abuse by both declarants and government questioners (App. 102-03). Applying these principles, the Minnesota Supreme Court determined that consideration of the substantial purpose of the statement from the perspectives of both the declarant and the government questioner was critical (App. 102-03, 107-10). That holding was not objectively unreasonable.

The Minnesota Supreme Court found that "neither the child-protection worker nor the child declarant, TB, were acting, to a substantial degree, in order to produce a statement for trial" (App. 112-13). Based on those findings, it was not objectively unreasonable for the Minnesota Supreme Court to conclude that Molden's questioning of TB was not the "functional equivalent" of a prototypical police interrogation conducted by police officers. Moreover, the Minnesota Supreme Court also concluded that "given TB's very young age, it is doubtful that he was even capable of understanding that his statements would be used at trial" (App. 116). It was not

(and is not) objectively unreasonable to conclude, as Professor Friedman suggests, that "young children . . . may be incapable of being witnesses within the meaning of the Confrontation Clause." For that reason as well, the Minnesota Supreme Court's judgment was not objectively unreasonable.

Giving the Minnesota Supreme Court's decision the leeway it was required to be given under AEDPA, the state court's application of *Crawford* was not unreasonable.

II. The Eighth Circuit Exceeded Its Authority Under AEDPA By Making Factual Determinations Contrary To Those Made By The Minnesota Court, By Failing To Consider The Same Record As The One Before The State Court, And By Construing A State Statute Differently Than The State Court Interpreted It.

The Eighth Circuit could only conclude that Molden acted as a "surrogate" for the police when she interviewed TB, and that the interview was the "functional equivalent" of a police interrogation, by rejecting the Minnesota Supreme Court's contrary factual findings and construction of state law. AEDPA, however, requires that federal courts presume the correctness of state courts' factual findings, and longstanding law requires that federal courts accept state courts' construction of state law. The Eighth Circuit's violation of those principles compounds the need for this Court's intervention.

First, under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Accordingly, a federal court's "use [of] a set of debatable inferences to set aside the [factual] conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice v. Collins*, 546 U.S. 333, 342 (2006). When a federal court fails to accord the required deference to the state court, it "fail[s] to respect the limited role of federal habeas relief" prescribed by Congress and Supreme Court precedent. *Brown,* 551 U.S. at 10. The Eighth Circuit disregarded these constraints.

Most notably, the Eighth Circuit found that the interview of TB was initiated by a police officer and was conducted for the purpose of the criminal investigation (App. 11-12). This is contrary to the Minnesota Supreme Court's finding that the interview was initiated by the child protection worker for the overriding purpose of assessing whether abuse occurred and whether action was needed to protect the child's health and welfare (App. 115). Yet the Eighth Circuit did not even mention § 2254(e)(1) and the presumption of correctness. Instead, it "use[d] a set of debatable inferences" to reach the opposite factual conclusion.

The record, however, provides ample support for the Minnesota Supreme Court's finding. At trial, Detective Akerson explained how he became involved

in the investigation in this case, saying, "[w]e received a report from the Kandiyohi County Family Service Department of this alleged abuse. Cherlynn Molden had called me. We set up a time to interview the child, the victim in this case." (JA428). Ignoring that statement altogether, the Eighth Circuit latched onto the following testimony from Molden: "Detective Akerson from the Police Department asked me to assist him in interviewing [TB]. I wasn't involved in that part of the investigation, but he asked me to assist him" (App. 3; JA378). The Eighth Circuit construed that statement as follows: "Molden stated Detective Akerson asked her to 'assist him' in questioning TB and that she was not involved in the *criminal investigation* until Detective Akerson 'asked [her] to assist him'" (App. 12 (emphasis in original)). The Eighth Circuit's assumption that Molden was referring to the "criminal" investigation when she said she was not involved in "that part of the investigation" is not supported by the record.

Under Minn. Stat. § 626.556, social services and law enforcement work together upon receiving a child abuse report. Under that statute, the child protection agency is responsible for "assessing or investigating" the report of abuse (*see, e.g.*, Minn. Stat. § 626.556, subd. 3, at App. 134-35). Therefore, when she was testifying, Molden could have been explaining that she was not previously involved in the *child protection investigation*. This is a fair inference from the record, especially since Detective Akerson said he became involved in the case upon receiving a report

from social services. Given the testimony, it was proper for the Minnesota Supreme Court to conclude that that the interview was initiated by the child protection worker. Only by "us[ing] a set of debatable inferences" could the Eighth Circuit "set aside the [factual] conclusion" of the Minnesota Supreme Court; but as this Court held in *Rice v. Collins*, 546 U.S. at 342, AEDPA bars federal courts from granting habeas relief on that basis.

Second, the Eighth Circuit compounded that error by failing to consider the same record as the Minnesota Supreme Court considered. "[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Holland v. Jackson*, 542 U.S. 649, 652 (2004). The Eighth Circuit, however, did not consider the actual interview of TB, even though the videotape was considered by the Minnesota Supreme Court. The videotape of the interview was played at trial and introduced as Exhibit One (JA397). The Minnesota Supreme Court had the videotape of the interview as part of its record. *See* Minn. R. Crim. P. 28.02, subd. 8, and 29.04, subd. 11 (stating that the record on appeal in the Minnesota Supreme Court includes the exhibits offered at trial). And the Minnesota Supreme Court's decision quoted portions of the interview, discussed what occurred "[i]n the interview," and noted TB's responses to Molden's questions regarding the location of TB's father during the abuse (App. 96-97, 115-16). Thus, what was said during the interview was relevant to the Minnesota Supreme Court's

decision that Molden's primary purpose was to protect the health and well-being of TB.

The federal district court acknowledged that it did not have the video or a transcript of it (App. 44 n.7), but nonetheless denied the state's motion to expand the record to include the videotape (JA254-59). The Eighth Circuit did not address the state's appeal of the district court's denial of the motion to expand the record, and therefore issued its decision without access to the video or transcript. That evidence, however, bears directly on the Eighth Circuit's factual findings. The Eighth Circuit held that "the district court did not clearly err in finding Molden did not ask the type of questions one would reasonably expect if the purpose of the interview was to assess 'imminent' risks to TB's health and welfare. . . ." (App. 14). The court further explained that, "[i]t is the circumstances of the interview at issue which must control, not just the purpose of the statute itself" (App. 14). But if the circumstances of the interview control, then the actual interview is relevant to the determination of whether the statements are testimonial. In failing to consider the videotape or a transcript of it, the Eighth Circuit violated AEDPA.

Third, the Eighth Circuit also exceeded its authority by failing to give deference to the Minnesota Supreme Court's interpretation of the state statute under which the interview was conducted. It is well established that a federal court must follow a state court's interpretation of state laws. *See Bradshaw v. Richey*, 546 U.S. 74, 75-76 (2006) ("We have

repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); *Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975).

In considering whether TB's statement was testimonial, the Minnesota Supreme Court examined Minn. Stat. § 626.556, the statutory scheme for reporting, investigating, and responding to threats to a child's health and welfare (App. 113-15). The Minnesota Supreme Court observed that the statute requires "the local welfare agency," following a report of abuse, to "'conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible'" (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a), at App. 138)). The court concluded that, although the statute requires the welfare agency and law enforcement to "'coordinate the planning and execution of their respective investigation and assessment efforts to avoid duplication of fact-finding efforts and multiple interviews,'" (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a), at App. 138)), it is not "designed with the express purpose of facilitating the creation of out-of-court statements for a future trial" (App. 114).

The Eighth Circuit rejected the Minnesota Supreme Court's interpretation of the statute as authorizing social workers to interview minors for the purpose of assessing if abuse occurred and whether steps were needed to protect minors' health and welfare. The Eighth Circuit instead concluded that the statute, "rather than dispelling the hallmarks of traditional police interrogations, requires them" (App. 15). Indeed, the Eighth Circuit concluded – directly contrary to the Minnesota Supreme Court – that, "[f]ar from making such interviews unlike the police interrogation in *Crawford*, the statute mandates them to be the functional equivalent of such interrogations" (App. 15).[3]

In addition, the Eighth Circuit misstated the Minnesota Supreme Court's interpretation of the statute. The Eighth Circuit said:

> As the district court astutely noted, if a prosecutor six months after abuse occurred asked a social worker to help him videotape a statement for an upcoming trial, it would be unreasonable to conclude the purpose of the

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[3] The Eighth Circuit further concluded that the videotape requirement was consistent with a law enforcement purpose (App. 15). The Minnesota Supreme Court concluded that the fact that the interview is videotaped does not necessarily indicate the purpose of the interview is to create a statement for trial (App. 115). The use of a videotaped interview helps to avoid multiple interviews of the child, which are traumatic and increase the likelihood that the child will be confused by unnecessarily suggestive questions (App. 115).

> interview was to protect the child from immediate danger just because the statute says as much.

(App. 15). The Minnesota Supreme Court, however, would likely agree that such a statement is testimonial and would not rely on the statute to conclude otherwise. The Minnesota Supreme Court said, "[c]ertainly, communications in initial-assessment interviews may very well evolve into testimonial statements" (App. 116). The court gave as examples an interview with an older child who understands the law-enforcement consequence, or an interview "with more significant law-enforcement involvement" (App. 116). Thus, the Minnesota Supreme Court was not holding that every dual-purpose interview under the statute creates a nontestimonial statement.

The Eighth Circuit's interpretation of Minn. Stat. § 626.556 essentially compels the conclusion that *any* interview conducted pursuant to the statute creates a testimonial statement. This interpretation is not only contrary to the Minnesota Supreme Court's decision in this case, but it conflicts with the Minnesota Supreme Court's decisions in other child abuse cases. *See, e.g., State v. Krasky*, 736 N.W.2d 636 (Minn. 2007) (holding that child's statements to nurse – after child was referred to nurse by social services and law enforcement – were not testimonial and relying in part on Minn. Stat. § 626.556), *cert. denied*, 128 S. Ct. 1334 (2008).

* * *

Given the questions left open by *Crawford*, the Minnesota Supreme Court's decision was not an unreasonable application of clearly established law. In addition, the Minnesota Supreme Court's factual determinations and interpretation of a state statute are entitled to deference. The Eighth Circuit's analysis of this case as if it were on direct appeal violates AEDPA and the presumption of finality afforded to state court convictions.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Dated: November 4, 2009

Respectfully submitted,

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PETITIONER'S APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3010

Orlando Manuel Bobadilla, Petitioner-Appellee,	*	
	*	Appeal from the
	*	United States
v.	*	District Court for
Terry Carlson, Warden,	*	the District
	*	of Minnesota.
Respondent-Appellant.	*	

Submitted: May 12, 2009
Filed: August 6, 2009

Before LOKEN, Chief Judge, BYE, Circuit Judge, and MILLER, District Judge.[1]

BYE, Circuit Judge.

Warden Terry Carlson appeals the district court's[2] order granting Orlando Manual Bobadilla's petition for writ of habeas corpus pursuant to 28 U.S.C.

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[1] The Honorable Brian Stacy Miller, United States District Judge for the Eastern District of Arkansas, sitting by designation.

[2] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

§ 2254. Bobadilla was convicted in Minnesota state court of sexually assaulting T.B., his three-year-old nephew. The district court concluded Bobadilla's rights under the Sixth Amendment's Confrontation Clause were violated and the Minnesota Supreme Court unreasonably applied United States Supreme Court precedent in concluding otherwise. For the following reasons, we affirm.

I

At the time of Bobadilla's conviction, T.B. lived with his mother. T.B.'s father lived separately with his mother, his stepfather, and his brother Bobadilla. On Friday, May 2, 2003, T.B. spent the weekend with his father, grandmother, and other relatives. T.B.'s mother picked him up on Sunday, and, while preparing him for bed, noticed a red area near his anus. In response to his mother's inquiry, T.B. said Bobadilla had inserted a finger into his rectum. T.B.'s mother called T.B.'s father, and they agreed to take T.B. to the emergency room at once. At the hospital, T.B. was examined by a physician, who determined the results were consistent with the abuse described by T.B. A police officer was dispatched to the hospital, where he interviewed T.B.'s parents and an emergency-room nurse.

Five days later, Detective Matthew L. Akerson of the Willmar Police Department conducted an interview with T.B. Detective Akerson contacted Cherlynn Molden, a social worker employed by the Kandiyohi

County Family Service Department and asked her to assist with the interview. According to Molden, "Detective Akerson from the Police Department asked me to assist him in interviewing [T.B.]. I wasn't involved in that part of the investigation [that is, the criminal investigation], but he asked me to assist him."

Molden contacted T.B.'s mother and asked her to bring T.B. to the police department. T.B. was escorted to a room specifically designed to make children comfortable while being questioned about allegations of sexual abuse. A camera hidden behind a one-way mirror recorded the interview. Molden sat next to T.B. and asked him questions, while Akerson sat across from T.B. and observed. Molden utilized a "forensic" technique known as the "CornerHouse technique," which consists of asking questions in a structured manner to ascertain the nature of any sexual abuse. In response to the questions, T.B. confirmed the abuse he had first reported to his mother.

Bobadilla was charged in Minnesota state court with first- and second-degree criminal sexual conduct. After speaking to T.B. at length, the trial court judge found him not competent to testify. In lieu of his testimony, the state sought to introduce Molden's testimony recounting her interview with T.B., as well as the video of the interview. Bobadilla objected to the admission of such evidence as a violation of the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. Such right is implicated whenever a statement by an unavailable declarant is introduced into evidence at trial, and the defendant has not had an opportunity to cross-examine the declarant. At the time of Bobadilla's trial, the admission of such evidence was governed by the standard set forth in *Ohio v. Roberts,* 448 U.S. 56 (1980). In *Roberts,* the Supreme Court held the admission of such statements did not violate the Confrontation Clause so long as the evidence bore "indicia of reliability" by falling "within a firmly rooted hearsay exception" or showing "particularized guarantees of trustworthiness." *Id.* at 66.

The trial court, applying *Roberts,* allowed Molden to testify and permitted the state to introduce the video of T.B.'s interview with Molden. In addition, the jury heard testimony from T.B.'s mother concerning T.B.'s initial report of abuse, as well as testimony from the doctor who initially examined T.B. Bobadilla was convicted and sentenced to 144 months in prison.

On appeal, Bobadilla once again challenged the admission of the video of T.B.'s interview, as well as Molden's testimony concerning the interview, as a violation of the Confrontation Clause. While his appeal was pending, the Supreme Court issued its decision in *Crawford v. Washington,* 541 U.S. 36 (2004), which set forth a materially different analysis for Confrontation Clause claims. In *Crawford,* the wife of a

suspect was placed in police custody, given *Miranda* warnings, and asked a series of questions. The wife's statement implicated her husband, and the government sought to introduce the wife's statement at trial. Because the defendant's wife invoked the state marital privilege and did not testify at trial, the defendant objected to the admission of her statement as a Confrontation Clause violation. The trial court admitted her statement, finding it bore particularized guarantees of trustworthiness under *Roberts*. In *Crawford,* however, the Supreme Court abandoned the *Roberts* test, concluding the Confrontation Clause had nothing to do with the reliability of the statement at issue. Rather, the Confrontation Clause served to prevent people from bearing testimony against a defendant without the defendant having an opportunity to cross-examine the bearer of the testimony. *Id.* at 50-51, 60-65. Thus, the Supreme Court held the "reliability" of a statement was immaterial. The Court held a Confrontation Clause violation exists whenever a "testimonial" statement is admitted against a defendant, regardless of the statement's reliability, when he or she has had no opportunity to cross-examine the declarant. *Id.* at 68-69.

While the Court declined to provide a comprehensive definition as to which statements are testimonial, it did note an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. The Court discussed various possible formulations of statements

which are testimonial: (1) "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52 (internal citations and quotation marks omitted).

In *Crawford,* the Court found it unnecessary to adopt one of the aforementioned formulations of testimonial statements because "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. Furthermore, the Court used the term "'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4. Recognizing that many definitions of "interrogation" may exist, the statement at issue in *Crawford,* "knowingly given in response to structured police questioning, qualifie[d] under any conceivable definition." *Id.*

Because of *Crawford,* the Minnesota Court of Appeals unanimously reversed Bobadilla's conviction, concluding his Confrontation Clause rights were violated. *State v. Bobadilla,* 690 N.W.2d 345, 349-50 (Minn. Ct. App. 2004). The court determined T.B.'s

statements made during the course of his interview with Molden were testimonial, and that, because Bobadilla did not have an opportunity to cross-examine T.B., the admission of those statements violated the Confrontation Clause. The Minnesota Supreme Court reversed, concluding T.B.'s statements were not testimonial. *State v. Bobadilla,* 709 N.W.2d 243, 256 (Minn. 2006). In doing so, the Minnesota Supreme Court applied an eight-factor test, with the most important factors being "whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial." *Id.* at 252.[3]

The court went on to conclude, because Molden's interview was conducted pursuant to Minnesota Statute § 626.556, neither Molden nor T.B. were acting with the predominant purpose of producing a statement for trial. The stated purpose of § 626.556 "is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse." Minn. Stat. § 626.556(1). The statute allows social workers to interview suspected victims of sexual or physical abuse and, notably, provides that if a report of abuse alleges a violation of a criminal

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[3] The remaining factors are: (1) whether the declarant was a victim or an observer; (2) whether it was the police or the declarant who initiated the conversation; (3) the location where the statements were made; (4) the declarant's emotional state when the statements were made; (5) the level of formality and structure of the conservation [sic] between the officer and declarant; and (6) if and how the statements were recorded. *Id.* at 250.

statute, "the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews." Minn. Stat. § 626.556, subd. 10(a). Furthermore, the statute requires, in cases involving alleged sexual abuse, that an audio-video recording be made of any interviews of the alleged victim. Minn. Stat. § 626.556, subd. 10(j).

First, the court noted the express purpose of § 626.556 was to protect the health and welfare of children, not to generate statements for trial. *Id.* at 254. Second, the court found it immaterial as to the statute requiring social workers to coordinate their investigations with law enforcement and to record the interviews so as to eliminate a need for separate interviews by law enforcement officers, concluding such requirements do not "necessarily indicate that the purpose of the interview was to create a formalized statement for trial." *Id.* at 255. In sum, the court concluded the statements were not testimonial because the interview "was initiated by a child protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child." *Id.* at 255.[4]

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[4] Although we will discuss this point in detail later in the opinion, while it is true Molden initiated the contact with T.B.'s

(Continued on following page)

Bobadilla next filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Minnesota. The district court concluded T.B.'s statements during the interview were testimonial, the admission of such statements violated the Confrontation Clause, and the Minnesota Supreme Court unreasonably applied Supreme Court precedent in concluding to the contrary. The court granted the petition for writ of habeas corpus, but stayed the order pending the outcome of this appeal.

II

In a habeas proceeding, this Court reviews the district court's conclusions of law de novo and its factual findings for clear error. *Randolph v. Kenna,* 276 F.3d 401, 403 (8th Cir. 2002). The Supreme Court has stated "that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973). A writ of habeas corpus is appropriate when a state prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A person is in custody in violation of the Constitution "'if any consecutive sentence the prisoner is

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mother, it was Detective Akerson who first decided to interview T.B. and requested that Molden do so.

scheduled to serve was imposed as the result of a deprivation of constitutional rights.'" *Garlotte v. Fordice,* 515 U.S. 39, 41 (1995) (quoting *Peyton v. Rowe,* 391 U.S. 54, 64-65 (1968)).

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, limits the power of federal courts to grant habeas relief for any claim "adjudicated on the merits in State court proceedings" unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The district court correctly concluded the decision of the Minnesota Supreme Court was not contrary to clearly established Federal law, as determined by the Supreme Court. Under the "contrary to" clause, federal courts may grant a writ of habeas corpus only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413 (2000). Because the Minnesota Supreme

Court applied the governing legal rule from *Crawford* – that the admission of testimonial statements absent an opportunity to cross-examine the declarant violates the Confrontation Clause – and did not reach a contrary conclusion on a set of materially indistinguishable facts, its decision was not "contrary to" clearly established law. *See id.* at 405-06.

The district court was correct to conclude, however, that the decision of the Minnesota Supreme Court was an "unreasonable application" of *Crawford.* Under this clause, a federal habeas court may grant the writ if "the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the principal case." *Id.* at 413. Additionally a decision "also involves an unreasonable application of [the] Court's precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. The Supreme Court has noted, however, that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original).

Crawford held that statements taken by police officers in the course of interrogations are testimonial under even the narrowest standard, and it was unreasonable for the Minnesota Supreme Court not to conclude the interview of T.B. was, in all relevant aspects, a form of police interrogation. First, the

interview was initiated by a police officer. Second, the interview was conducted for the purpose of the criminal investigation. Although Molden contacted T.B.'s mother, the evidence demonstrates it was Detective Akerson who requested Molden to do so. Furthermore, Molden stated Detective Akerson asked her to "assist him" in questioning T.B. and that she was not involved in the *criminal investigation* until Detective Akerson "asked [her] to assist him." Third, the interview was not conducted until five days after the abuse was first alleged, which indicates the purpose of the interview was to confirm a past allegation of abuse rather than to assess immediate threats to T.B.'s health and welfare. Because of these circumstances, this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation.

The only significant difference between the interview involved in the present case and the one held to be testimonial in *Crawford* is instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same. We find this to be a distinction without a difference. In addition to the aforementioned facts, the interview took place at police headquarters in a room specifically designed for the interrogation of children who allege sexual abuse. Furthermore, under the statute, the interview was recorded for the sole purpose of eliminating the need for T.B. to be

interviewed by law enforcement personnel. Molden also utilized a structured, "forensic" method of interrogating T.B. Notably, *Crawford* identified a "recorded statement, knowingly given in response to structured police questioning," as qualifying under any conceivable definition of interrogation. 541 U.S. at 53 n.4. In sum, Justice Page was correct to conclude Molden was simply acting as a "surrogate interviewer" for the police. *Bobadilla,* 709 N.W.2d at 258 (Page, J., dissenting). Molden was contacted by a police officer to assist with the criminal investigation, the interview took place several days after the abuse allegedly occurred, the interview was conducted at police headquarters with a police officer present, and Molden utilized a structured method of questioning to elicit T.B.'s statements. As such, it was unreasonable for the Minnesota Supreme Court to conclude, even though the questioning was undertaken by a social worker, the statements made by T.B. during his interrogation were in any way different than the statements found to be testimonial in *Crawford.*

We, like the district court, are unpersuaded by the existence of Minnesota Statute § 626.556. While it is true the statute authorizes social workers to interview alleged victims of abuse for the purpose of protecting their health and welfare, the circumstances of the present case, as described above, indicate such was not the purpose of T.B.'s interview. Contrary to the Minnesota Supreme Court's assertion, this interview was not conducted "for the overriding purpose of assessing whether abuse occurred, and whether steps

were therefore needed to protect the health and welfare of the child." *Id.* at 255. Molden's testimony makes clear she decided to interview T.B. only after Detective Akerson asked her to assist him with the criminal investigation. The interview being conducted five days after the alleged abuse is a further indication of its purpose, which was to elicit information for use at trial, rather than determining whether steps were needed to protect T.B.'s immediate health and welfare. Furthermore, given the alleged abuse was reported promptly and T.B.'s parents voluntarily cooperated with the investigation, there is no evidence T.B.'s health or welfare was in further danger. Additionally, the district court did not clearly err in finding Molden did not ask the type of questions one would reasonably expect if the purpose of the interview was to assess "imminent" risks to T.B.'s health and welfare, such as whether he had recently seen Bobadilla or whether he was spending any time at his grandmother's house. Instead, the interview consisted of highly structured questioning aimed at getting T.B. to repeat, on videotape, his allegation of abuse.

Thus, even if the purpose of an interview under Minnesota Statute § 626.556 is to assess immediate threats to a child's health and welfare, and thus different than the purpose of the police interrogation found to include testimonial statements in *Crawford,* such was not the purpose of this particular interview. It is the circumstances of the interview at issue which must control, not just the purpose of the statute itself.

As the district court astutely noted, if a prosecutor six months after abuse occurred asked a social worker to help him videotape a statement for an upcoming trial, it would be unreasonable to conclude the purpose of the interview was to protect the child from immediate danger just because the statute says as much. Just as such situation would clearly be akin to the police interrogation in *Crawford,* so too is the present interview, and it was unreasonable for the Minnesota Supreme Court to conclude otherwise.

Additionally, the statute, rather than dispelling the hallmarks of traditional police interrogations, requires them. The statute mandates social workers and police officers coordinate the planning and execution of their investigation to eliminate the need for multiple interviews. Thus, even if a social worker is acting for a different purpose, the statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation. In this vein, the statute also requires the social worker to videotape the interview so police officers do not have to conduct a second interview with the victim. In such cases, the social worker's interview is a substitute for, and functions as, the police interrogation. Far from making such interviews unlike the police interrogation in *Crawford,* the statute mandates them to be the functional equivalent of such interrogations.

In sum, *Crawford* held statements made during police interrogations are testimonial. The Minnesota

Supreme Court unreasonably applied *Crawford* in holding T.B.'s statements made during his interview with Molden and Detective Akerson were not testimonial. Just as in *Crawford,* the interview in the present case was initiated by a police officer to obtain statements for use during a criminal investigation, was recorded so further law enforcement interviews would be unnecessary, and involved structured questioning designed to confirm a prior allegation of abuse. No one disputes should Detective Akerson have conducted the questioning, such statements would be testimonial under *Crawford.* It was unreasonable for the Minnesota Supreme Court to conclude just because he requested another government agent to ask the same questions in order to achieve the same purpose, the result is different. Our conclusion is reinforced by § 626.526, which required Molden to act as a substitute for a police interrogator. Thus, we agree with the district court about Bobadilla's Confrontation Clause rights being violated and the Minnesota Supreme Court unreasonably applying *Crawford* in concluding to the contrary.

The district court was also correct to conclude the violation of the Confrontation Clause was not harmless. In determining whether an error is harmless we ask whether "the error had a substantial and injurious effect or influence in determining the jury's verdict." *Toua Hong Chang v. Minnesota,* 521 F.3d 828, 832 (8th Cir. 2008). While there was other evidence tending to prove Bobadilla's guilt, it is clear the prosecution's case rested heavily on Molden's

testimony and the videotape of her interview with T.B. The only other evidence admitted into trial was the testimony of T.B.'s mother recounting T.B.'s first statement he made about the abuse – the only statement outside of the interview in which he identifies Bobadilla as the perpetrator – as well as testimony from the doctor indicating the medical examination was consistent with sexual abuse. Given the other evidence of Bobadilla's guilt was minimal, it is likely the admission of T.B.'s statements made during the course of the interview had a substantial effect in influencing the jury's verdict. Thus, the error was not harmless.[5]

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[5] The Supreme Court has since issued additional decisions interpreting the scope of the Confrontation Clause. *Davis v. Washington*, 126 S.Ct. 2266 (2006) (holding that statements made during a 911 emergency call were not testimonial, while statements made to a police officer after the danger had passed were testimonial); *Melendez-Diaz v. Mass.*, 129 S.Ct. 2527 (2009) (holding that lab analyses introduced into trial are testimonial). The Court's decision in *Davis* strongly supports our conclusion that T.B.'s statements made during the course of the interview with Molden were testimonial, because "the circumstances indicate that there is no . . . emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 124 S. Ct. at 2273-74. *Davis* does not influence our analysis, however, because it was issued after the decision of the Minnesota Supreme Court in the present case, and does not impact whether the Minnesota Supreme Court unreasonably applied Supreme Court precedent at the time of its decision.

III

For the aforementioned reasons, we affirm the decision of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ORLANDO MANUEL BOBADILLA, Petitioner, v. WARDEN TERRY CARLSON, Respondent.	Case No. 07-CV-1649 (PJSIRLE) ORDER GRANTING 28 U.S.C. § 2254 PETITION FOR WRIT OF HABEAS CORPUS

Lynne A. Torgerson, TORGERSON LAW OFFICE, for petitioner.

Kimberly R. Parker and Peter R. Marker, MINNESOTA ATTORNEY GENERAL'S OFFICE, for respondent.

Orlando Bobadilla was convicted in a Minnesota state court of sexually assaulting T.B., his three-year-old nephew. T.B. did not testify at Bobadilla's trial, as the judge found that T.B. was incompetent. But the judge did permit the prosecution to introduce into evidence a videotaped statement that T.B. had given to a social worker and a police officer. In that statement, T.B. accused Bobadilla of sexually assaulting him.

The Minnesota Court of Appeals overturned Bobadilla's conviction, holding that the introduction of T.B.'s out-of-court statement violated Bobadilla's rights under the Confrontation Clause. *State v. Bobadilla*, 690 N.W.2d 345, 349-50 (Minn. Ct. App.

2004). A divided Minnesota Supreme Court reversed and reinstated Bobadilla's conviction. Over Justice Page's dissent, the majority found that T.B.'s out-of-court statement was not "testimonial" for purposes of *Crawford v. Washington*, 541 U.S. 36 (2004), and thus that introduction of the statement against Bobadilla was not barred by the Confrontation Clause. *State v. Bobadilla*, 709 N.W.2d 243, 248-56 (Minn. 2006).

Bobadilla now petitions for a writ of habeas corpus under 28 U.S.C. § 2254. In a March 25, 2008 Report and Recommendation ("R&R"), Chief Magistrate Judge Raymond L. Erickson recommended that Bobadilla's petition be denied – not because Judge Erickson concluded that the decision of the Minnesota Supreme Court was correct, but because he concluded that, whether correct or not, the decision did not represent an unreasonable application of clearly established law for purposes of § 2254(d)(1). After carefully reviewing *Crawford*, the Minnesota Supreme Court's opinion, and the entire record (including the transcript of Bobadilla's trial), this Court concludes that the Minnesota Supreme Court did, in fact, unreasonably apply clearly established law in concluding that Bobadilla's right to confrontation was not violated by the introduction of T.B.'s out-of-court statement. For that reason, this Court grants Bobadilla's petition for a writ of habeas corpus.

I. BACKGROUND

T.B.'s father and mother lived apart. T.B.'s mother lived with T.B. T.B.'s father lived at home

with his own mother (T.B.'s grandmother), his stepfather, his brother Bobadilla (T.B.'s uncle), and a second brother. Trial Tr. 130, 173-74 [Docket No. 11] (hereinafter "TT ___"). On Friday, May 2, 2003, T.B.'s mother dropped off her son to spend the weekend with his father, grandmother, and other relatives. TT 143-44. T.B.'s mother picked up T.B. late on the evening of Sunday, May 4, took him home, and prepared him for bed. TT 144. While changing T.B.'s diaper, T.B's mother noticed redness near his anus and asked T.B. about it. TT 144. Using a child's terminology, T.B. told his mother that Bobadilla had inserted a finger in his rectum. TT 144-45.

T.B.'s mother called T.B.'s father and told him what T.B. had said. TT 145. T.B's father, in turn, spoke to T.B.'s grandmother, and the grandmother urged T.B.'s parents to take T.B. to the emergency room at once. TT 181. T.B.'s father and grandmother picked up T.B.'s mother and T.B., and the four drove to Rice Memorial Hospital in Willmar, Minnesota. TT 181-82. At the hospital, T.B. was examined by an emergency-room physician. TT 182. The doctor determined that the redness around T.B.'s anus was consistent with the sexual abuse described by T.B. TT 155. A police officer was dispatched to the hospital, where he interviewed T.B.'s parents and an emergency-room nurse. TT 182; *Bobadilla*, 709 N.W.2d at 246-47. The officer forwarded his report to the Investigations Unit of the Willmar Police Department and to the Kandiyohi County Family Service Department. *Bobadilla*, 709 N.W.2d at 247.

Sometime later, Detective Matthew L. Akerson of the Willmar Police Department – the police officer leading the criminal investigation of Bobadilla – decided to interview T.B. Akerson contacted Cherlynn Molden, a social worker employed by the Kandiyohi County Family Service Department, and asked for her assistance with the interview. TT 117. Molden agreed to arrange the interview and to assist Akerson in questioning T.B. TT 117. Molden had difficulty reaching T.B.'s mother, but the two finally spoke on the morning of May 9, 2003. TT 129, 138. Later that day, T.B.'s mother and father brought T.B. to police headquarters, where they were greeted by Akerson and Molden and escorted to a special interview room designed to make children feel comfortable while being questioned about allegations of sexual abuse. TT 117, 119, 138-39. Molden sat next to T.B. and asked him questions; Akerson sat across from Molden and T.B. and observed; and a camera hidden behind a one-way mirror recorded the interview. TT 117-18, 119, 167.

Molden asked T.B. questions in a highly structured manner, following what is known as the "CornerHouse protocol" or "CornerHouse technique" – an approach used by police officers, social workers, and others in interviewing children about allegations of sexual abuse. TT 114-16. The Minnesota Supreme Court described the CornerHouse approach as follows:

> The protocol consists of establishing rapport with the child, ascertaining the child's terms

> for parts of the anatomy, ascertaining whether abuse occurred, and closing with a "safety message." The CornerHouse technique instructs the interviewer to ask non-leading questions, to use terms children would understand, and to progress quickly since young children have short attention spans.

Bobadilla, 709 N.W.2d at 247.

During the interview, T.B. told Molden and Akerson the same thing that he had told his mother on the night that he had been taken to the hospital: that Bobadilla had inserted a finger in T.B.'s rectum. The key exchange was the following:

> CPW[1]: [H]as anybody hurt your body?
>
> T.B.: Mmm, MmmMmm (affirmative)
>
> CPW: Yeah. Who hurt your body?
>
> T.B.: Orlando did.
>
> CPW: Orlando did. . . . How did Orlando hurt your body?
>
> T.B.: He (inaudible) my (inaudible).
>
> CPW: What?
>
> T.B.: He, he (inaudible) touch my (inaudible).

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[1] "CPW" stands for "child-protection worker" – that is, Molden.

CPW: (inaudible) your bootie. Okay. What did he do to your bootie?

T.B.: (inaudible) put his finger in there.

CPW: He just put his finger in there? Okay. . . .

Bobadilla, 709 N.W.2d at 247.

Bobadilla was charged with first- and second-degree criminal sexual conduct. At trial, after speaking to T.B. at length, the judge found that he was not competent to testify. TT 47. Over Bobadilla's objections, though, the judge permitted the prosecution to introduce evidence of T.B.'s out-of-court statements about the sexual assault. Specifically, T.B.'s mother testified about the statement that T.B. made to her at home on May 4, and Molden testified about the statement that T.B. made to her and Akerson at police headquarters on May 9. In addition, the prosecutor was permitted to play for the jury a videotape of the interview at police headquarters. Bobadilla was convicted and sentenced to 144 months in prison.

While Bobadilla's appeal was pending before the Minnesota Court of Appeals, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court held that the Confrontation Clause forbids the admission of "testimonial" hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. Applying *Crawford*, the Minnesota Court

of Appeals unanimously found that the statement made by T.B. during the interview at police headquarters was "testimonial" and therefore that the admission of the videotape of that interview, as well as Molden's testimony about T.B.'s statement, violated Bobadilla's right of confrontation. *See State v. Bobadilla*, 690 N.W.2d 345, 349-50 (Minn. Ct. App. 2004).

The Minnesota Supreme Court granted the state's petition for review and, over Justice Page's strong dissent, reversed the decision of the Minnesota Court of Appeals. The court held that the statement made by T.B. during the interview at police headquarters was not "testimonial" under *Crawford* and therefore its admission did not violate the Confrontation Clause. *Bobadilla*, 709 N.W.2d at 246. After the United States Supreme Court denied Bobadilla's petition for certiorari, Bobadilla filed this petition for habeas corpus.[2]

II. ANALYSIS

A. Standard of Review

Bobadilla seeks habeas relief on the ground that his conviction was obtained in violation of the

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[2] In this proceeding, Bobadilla challenges only the admission of evidence of what T.B. said during his interview with Molden and Akerson at police headquarters; he does not challenge the admission of evidence of what T.B. said to his mother before he was taken to the hospital.

Confrontation Clause. There is no dispute that Bobadilla raised this claim at every stage of his state-court proceedings. Bobadilla's claim is therefore properly before this Court as a fully exhausted claim that he is "in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a), (b)(1)(A).

Under § 2254(d), this Court cannot grant habeas relief to a state prisoner unless the state's adjudication of the prisoner's federal claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"[C]learly established Federal law" means the holdings, and not the dicta, of Supreme Court opinions that had been released prior to the date on which the state court issued its decision. *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653 (2006). To act "contrary to" clearly established federal law, the state court must have either (1) arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*,

529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, federal habeas relief is warranted if the state court identified the correct governing legal principle, but unreasonably applied that principle to the facts of the case. *Id.* at 413. It is not enough, under the "unreasonable application" clause, that the state court's decision was wrong, or even that it was clear error; the decision must be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Finally, on habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. Clearly Established Federal Law under Crawford

The Confrontation Clause of the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The right of confrontation applies in state criminal proceedings by virtue of its incorporation into the Fourteenth Amendment's guarantee of due process. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

The United States Supreme Court has long struggled to define when the Confrontation Clause prohibits the introduction of hearsay evidence against a defendant at a criminal trial. In *Ohio v. Roberts*,

448 U.S. 56 (1980), the Supreme Court held that an out-of-court statement could not be admitted against a defendant unless the declarant was unavailable and the statement bore adequate "indicia of reliability." *Id.* at 66. A showing that the statement fell within a "firmly rooted hearsay exception" was sufficient to establish its reliability (and hence its admissibility). *Id.* But if the statement did not fall within a hearsay exception that was "firmly rooted," then the statement could not be admitted unless the prosecution made "a showing of particularized guarantees of trustworthiness." *Id.*

The *Roberts* rule of reliability was the subject of much criticism. Courts and commentators faulted the approach as leading to unpredictable and inconsistent results and allowing the admission of evidence that plainly violated the core values protected by the Confrontation Clause. The Supreme Court finally abandoned the *Roberts* approach in *Crawford v. Washington*, 541 U.S. 36 (2004), holding that the Confrontation Clause admitted of no "general reliability exception," *id.* at 62. Justice Scalia, writing for the majority, explained:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by

> testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. at 61.

Under *Crawford*, the admissibility of hearsay under the Confrontation Clause turns not on whether the out-of-court statement is reliable, but on whether the statement is "testimonial." Hearsay that is "testimonial" may not be admitted against a defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. In this case, Bobadilla did not have an opportunity to cross-examine T.B. Thus, as both the Minnesota Court of Appeals and the Minnesota Supreme Court recognized, if the statement that T.B. gave to Molden and Akerson at police headquarters was "testimonial," then the Confrontation Clause barred the use of that statement against Bobadilla.

The United States Supreme Court acknowledged in *Crawford* that "testimonial" has been defined in different ways. *Id.* at 51-52. According to the Court, however, all of the definitions "share a common nucleus," and thus, "[r]egardless of the precise articulation, some statements qualify under any definition. . . ." *Id.* at 52. As the Court explained:

> Whatever else the term ["testimonial"] covers, it applies at a minimum to prior

> testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68 (emphasis added). The Court repeatedly cited "[s]tatements taken by police officers in the course of interrogations" as statements that must be considered "testimonial" "under any definition" or "under even a narrow standard." *Id.* at 52. "[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay," the Court said, "that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 53 (footnote omitted).

It is true that the Supreme Court declined "to spell out a comprehensive definition of 'testimonial,'" *id.* at 68 – that is, a definition that would encompass statements beyond those falling within the "common nucleus." And it is also true that the Court acknowledged "that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty." *Id.* at 68 n.10. What is critical for purposes of this case, however, is the *reason* why the Court did not articulate a comprehensive definition of "testimonial." The Court explained that articulating such a definition was unnecessary because the specific statement at issue in *Crawford* – a statement made by Sylvia Crawford, the defendant's wife – "[was] testimonial under any definition."

Id. at 61. And the reason why Sylvia Crawford's testimony was "testimonial under any definition" was because the statement was taken in the course of a police interrogation.

In sum, while *Crawford* left much unsettled, the Supreme Court was absolutely clear that "[s]tatements taken by police officers in the course of interrogations" are "testimonial" and cannot be admitted unless the declarant is unavailable and the defendant has had an opportunity to cross-examine the declarant. This holding was "clearly established Federal law, as determined by the Supreme Court of the United States," at the time that the Minnesota Supreme Court issued its decision in Bobadilla's case. 28 U.S.C. § 2254(d)(1).

C. The Minnesota Supreme Court's Decision

Despite the clarity of *Crawford*'s holding, the Minnesota Supreme Court did not directly address the question whether T.B.'s statement was "taken by police officers in the course of [an] interrogation[ ]." Instead, the court addressed that question only by implication.

The court began its legal analysis by identifying its "sole inquiry" as "whether T.B.'s statements in the interview with the child-protection worker [Molden] were 'testimonial' under *Crawford*." *Bobadilla*, 709 N.W.2d at 249. (Of course, a police detective (Akerson) was also present during that interview, but the court ignored that fact throughout its legal

analysis.) The court said that, in distinguishing "testimonial" statements from "nontestimonial" statements, it would apply an eight-factor test that it had developed in an earlier case – *State v. Wright*, 701 N.W.2d 802, 812-13 (Minn. 2005).[3] *Id.* at 250. Under

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[3] In *Wright*, the Minnesota Supreme Court held that statements made by crime victims to 911 operators and to police officers during field investigations were not "testimonial." *Wright*, 701 N.W.2d at 811, 814. The United States Supreme Court vacated and remanded *Wright* for reconsideration in light of *Davis v. Washington*, 547 U.S. 813 (2006). *See Wright v. Minnesota*, 126 S.Ct. 2979 (2006). On remand, the Minnesota Supreme Court held again that statements made during 911 calls were not "testimonial," but the court concluded that, under *Davis*, statements made to police officers during field investigations were "testimonial." *State v. Wright*, 726 N.W.2d 464, 474, 476 (Minn. 2007).

In *Davis*, the United States Supreme Court shed considerable light on the definition of "testimonial." But because *Davis* was decided after the Minnesota Supreme Court reinstated Bobadilla's conviction, *Davis* is not part of the "clearly established Federal law" in light of which this Court must evaluate the court's decision. The Court notes, however, that *Davis* refined *Crawford*'s holding that statements made during the course of police interrogations are "testimonial." In *Davis*, the Court held that statements made during a police interrogation are "nontestimonial" when the circumstances objectively indicate that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. *Davis*, 547 U.S. at 822. To be clear, therefore, the term "police interrogation" as used in this opinion is meant to refer to a police interrogation like the one in *Crawford*: formal police questioning that took place some time after an alleged crime (and thus not under emergency circumstances) and that was structured to elicit from a victim or a witness a statement regarding the facts and circumstances of the crime.

that test, two of the eight factors are considered "central": "the declarant's purpose in speaking with the officer" and "the officers' purpose in speaking with the declarant." *Id.* The other six factors[4] are merely "probative" of those two central factors. *Id.* After refining its eight-factor test, the court held that "the key to determining whether a statement is testimonial is whether *either* a declarant *or* government questioner is acting, to a substantial degree, in order to produce a statement for trial." *Id.* at 252 (emphasis added). The court recognized that "[o]ften, government questioners and declarants will have multiple purposes" in taking or giving a statement. *Id.* But, the court said, "the fact that a statement is given or taken partially for reasons other than preservation for trial does not preclude a determination that the statement is testimonial." *Id.*

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[4] The entire test is as follows:

> (1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded.

Wright, 701 N.W.2d at 812-13.

In the view of the court, then, determining whether the statement that T.B. gave at police headquarters was "testimonial" depended upon Maiden's purpose in *asking* and T.B.'s purpose in *answering* questions. (Again, Akerson was ignored in the court's analysis.) The court did not explicitly address the question whether T.B.'s statement was taken during a police interrogation because, the court said, "a reasonable questioner taking a statement" in the course of a police interrogation "would *always* exhibit a substantial concern with producing a statement for use in legal proceedings." *Id.* at 253 (emphasis added). In other words, the court did not believe that it needed to inquire about whether T.B. gave a statement in the course of a police interrogation until it first found that Molden's purpose in asking questions was to acquire evidence – because, in the absence of such a purpose, the interview could not possibly have been a police interrogation.

The court then set out to identify Molden's purpose in asking questions of T.B., and T.B.'s purpose in answering those questions. The court described this as an objective, not subjective, inquiry. *Id.* In other words, the court did not inquire into Molden's or T.B.'s actual purposes. Rather, it asked what would have been the purpose of "a reasonable government questioner or declarant in the relevant situation." *Id.* The court also defined "the relevant situation" extraordinarily narrowly. As will be described below, about the only fact that the court considered relevant in determining T.B.'s purpose

was his age, and about the only fact that the court considered relevant in determining Molden's purpose was the statute under which she was purportedly acting. Numerous facts that would seem relevant to either a subjective or objective inquiry into purpose were left out of the court's analysis entirely.

As for T.B., the court determined that his purpose in answering Molden's questions – or, more accurately, the purpose of a reasonable declarant in T.B.'s situation – was not to provide evidence for use against Bobadilla in criminal proceedings, The court based its conclusion almost entirely on T.B.'s age. In the court's words:

> given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial. As amicus American Prosecutors Research Institute makes clear, children of T.B.'s age are simply unable to understand the legal system and the consequences of statements made during the legal process.

Id. at 255-56.

As for Molden, the court determined that Molden's purpose in asking questions – or, more accurately, the purpose of a reasonable government questioner in Molden's situation – was also not to elicit evidence against Bobadilla. The court based its conclusion almost solely on Minn. Stat. § 626.556

(2004).[5] Under that statute, when criminal child abuse is reported, that report must be passed on to both the local welfare agency and law enforcement, and each plays a distinct role in responding to the report. The local welfare agency must

> immediately conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible.

Minn. Stat. § 626.556, subd. 10(a). Law enforcement, of course, must conduct a criminal investigation. And, according to the court, the "clearly delineated purpose" of the overall statutory scheme "is to protect the health and welfare of children." *Bobadilla*, 709 N.W.2d at 254.

The court determined that Malden was not "acting, to a substantial degree, in order to produce a statement for trial" because she was interviewing T.B. "in accord with a statutory scheme for reporting, investigating, and responding to threats to children's health or welfare." *Id.* As the court explained:

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[5] Section 626.556 has been amended frequently. The Minnesota Supreme Court quoted and relied on the version of § 626.556 in effect at the time Molden and Akerson were investigating T.B.'s allegations, and this Court's discussion refers only to that version.

> Here, the interview of T.B. was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child. In the interview, the child-protection worker established rapport with T.B., identified the child's terms for human anatomy, made a touch and abuse inquiry, and closed the interview. If part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to T.B.'s health and welfare. Much like the at-the-scene police questioning in *Wright*, the interview of T.B. "represent[s] a response to a call for assistance and preliminary determination of 'what happened' and whether there was immediate danger, rather than an effort to gather evidence for a future trial." 701 N.W.2d at 813-14.

Id. at 255. The court conceded that "an interview with more significant law-enforcement involvement might . . . exhibit a greater purpose on the part of a declarant or government questioner to produce statements for use at a future trial." *Id.* at 256. But, the court said,

> we conclude that in this case, neither T.B. nor the child-protection worker were acting, to a substantial degree, in order to produce a statement for trial, and therefore T.B.'s

> statements in the assessment interview were not testimonial.

Id. Although the court did not say so specifically, its conclusion that Molden did not act to a substantial degree to gather evidence against Bobadilla was necessarily a conclusion that her interview of T.B. was not a police interrogation for purposes of *Crawford*.

D. Unreasonable Application of Clearly Established Federal Law

With due respect to the Minnesota Supreme Court, this Court holds that its decision in Bobadilla's case represents an "unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Specifically, this Court holds that the Minnesota Supreme Court's conclusion that T.B.'s statement was not given in the course of a police interrogation for purposes of *Crawford* was objectively unreasonable.

Justice Page had it exactly right: The statement given by T.B. to Malden and Akerson "fit[s] squarely within Crawford's pronouncement that '[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Bobadilla,* 709 N.W.2d at 258 (Page, J., dissenting) (quoting *Crawford,* 541 U.S. at 52). Consider the following:

1. The interview of T.B. was conducted five days after the crime was committed. As Justice Page explained, "the investigation in this case had already started, the police were involved before the interview occurred, [and] the identity of the suspect was known. . . ." *Id.* (Page, J., dissenting). This is strong evidence that T.B. was questioned in the course of a police interrogation.

Even accepting every fact relied on by the Minnesota Supreme Court as true, the court was simply incorrect in concluding that "[m]uch like the at-the-scene police questioning in *Wright*, the interview of T.B. 'represent[s] a response to a call for assistance and preliminary determination of "what happened" and whether there was immediate danger, rather than an effort to gather evidence for a future trial.'" *Id.* at 255. In T.B.'s case, the "call for assistance" had been placed *five days earlier*. A police officer had responded to that call, going to the hospital, interviewing T.B.'s parents and an emergency-room nurse, making a "preliminary determination of 'what happened,'" and determining "whether there was immediate danger." It was the statements given by T.B.'s parents and the emergency-room nurse – and not the statement given by T.B. several days later at police headquarters – that were comparable to the

statements given to the police officers who responded to 911 calls in *Wright*.[6]

2. The person who initiated the interview of T.B. was Akerson – the detective in charge of conducting the criminal investigation of Bobadilla. This, too, is strong evidence that the interview was a police interrogation.

Although the question of who initiated the interview was not determinative for the Minnesota Supreme Court – and certainly is not determinative for this Court – it should nevertheless be noted that the Minnesota Supreme Court's assertion that the interview of T.B. "was initiated by a child-protection worker in response to a report of sexual abuse" is flatly contracted by the testimony of that child-protection worker. Molden testified as follows:

> Q. At some point did you become involved in the interview of [T.B.]?
>
> A. Yes, I did.
>
> Q. And why don't you explain how that happened.
>
> A. Sure. *What happened is Detective Akerson from the Police Department asked me*

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[6] As explained above (*see supra* at note 3), the Minnesota Supreme Court later abrogated its holding in *Wright* and determined that statements made to police officers during field investigations are indeed "testimonial." *State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007).

> *to assist him in interviewing [T.B.].* I wasn't involved in that part of the investigation, but he asked me to assist him.
>
> Q. And what happened when you got that call.
>
> A. I made arrangements with [T.B.]'s mother to have him brought in to the Law Enforcement Center for the interview.

TT 117 (emphasis added).

3. As noted, Molden was present at the interview because she was asked by Akerson to assist him in the criminal investigation of Bobadilla. Molden's testimony on this point was clear: Molden said that she had *not* been involved "in that part of the investigation [that is, in the criminal investigation], "*but* he asked me to assist him" – that is, "Detective Akerson from the Police Department asked me to assist him in interviewing [T.B.]." TT 117 (emphasis added). This is strong evidence that, as Justice Page described it, Molden was acting as a "surrogate interviewer" for the police in questioning T.B. *Bobadilla,* 709 N.W.2d at 258 (Page, J., dissenting).

4. The interview of T.B. took place at police headquarters, in a room specially designed for the interrogation of children regarding allegations of sexual abuse. This, too, is evidence that the interview of T.B. was a police interrogation.

5. There was nothing spontaneous or informal about the interview. Rather, Molden – who had been trained in a "forensic" method of interviewing children (TT 115) – subjected T.B. to a highly structured series of questions. Molden followed the "Corner-House protocol, which . . . consists of establishing rapport with the child, ascertaining the child's terms for parts of the anatomy, ascertaining whether abuse occurred, and closing with a 'safety message.'" *Bobadilla,* 709 N.W.2d at 247. *Crawford* specifically identified "structured police questioning" as a hallmark of a police interrogation. 541 U.S. at 53 n.4.

6. There is no evidence in the record – save the provisions of Minn. Stat. § 626.556 (which will be addressed below) – supporting the Minnesota Supreme Court's assertion that the "main purpose" of the interview of T.B. was "assessing and responding to imminent risks to T.B.'s health and welfare." *Bobadilla,* 709 N.W.2d at 255. Nor is there any evidence (save, again, the statute) supporting the court's assertion that the interview was initiated by Molden "for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child." *Id.* Nothing in the record indicates that *a* purpose of either Molden or Akerson – much less a "main" or "overriding" purpose – was protecting T.B. from immediate or imminent danger. To the contrary, two things point strongly in the opposite direction:

First, nothing in the record suggests that there *were* any "imminent risks to T.B.'s health and welfare" at the time of the interview on May 9. Again, the abuse occurred, at the latest, on May 4 – five days earlier. The abuse occurred not at T.B.'s home, but at his grandmother's home, during a weekend visit. The culprit was not T.B.'s mother or father, but an uncle who did not live with T.B. and who had no access to T.B. without the permission of T.B.'s parents. The abuse was not hidden by anyone: T.B. reported the abuse to his mother within hours, T.B.'s mother immediately reported it to T.B.'s father, and T.B.'s father immediately reported it to T.B.'s grandmother. T.B.'s parents and grandmother took the report seriously. They promptly transported T.B. to an emergency room, and, after a police officer was called, they cooperated with his investigation. When asked to bring T.B. in for an interview, the parents promptly complied, and both parents accompanied T.B. to police headquarters. In short, the record suggests no reason to believe that T.B.'s parents were in any way responsible for the abuse, and no reason to believe that, after T.B. accused Bobadilla of abuse, T.B.'s parents were failing to protect him. To the contrary, all of the evidence in the record (and described by the Minnesota Supreme Court) is that T.B.'s parents acted quickly and responsibly to protect their son's health and welfare. Nothing mentioned by the Minnesota Supreme Court – and nothing that this Court has been able to find in the record – suggests that, by May 9, Molden or anyone else had reason to fear an "immediate danger" or "imminent risk" to T.B.

Second, reflecting this fact, there is no indication in either the Minnesota Supreme Court's opinion or the record that Molden asked T.B. the kind of questions that a social worker would have asked him if her "overriding" or "main" purpose was to assess "imminent" or "immediate" risks to his health and welfare. For example, Molden apparently[7] did not ask whether T.B. had recently seen Bobadilla or whether he was spending any time at his grandmother's house. Instead of inquiring about possible risks to T.B., Molden asked a highly structured series of questions that appeared to be aimed toward one goal: getting T.B. to repeat, on videotape, his assertion that Bobadilla had abused him.

In short, even if one accepts the Minnesota Supreme Court's view that an interview cannot be an "interrogation" unless acquiring evidence for use at trial is a substantial purpose of the questioner, the evidence is overwhelming that T.B.'s statement was taken in the course of an interrogation. Even the item of evidence on which the court relied almost entirely – Minn. Stat. § 626.556 – supports this conclusion.

It is true that, under the statute, social workers such as Malden must act to protect the health and

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[7] The record before this Court does not contain a transcript of the full interview of T.B. The Court bases its assertions about that interview on the Minnesota Supreme Court's description of the interview, as well as information about the interview that appears in the trial transcript, briefs, and other documents included in the record.

welfare of an abused child – and, toward that end, must "immediately conduct an assessment" of whether the child is in imminent danger. Minn. Stat. § 626.556, subd. 10(a). And it is also true that, under the statute, law enforcement officers such as Akerson must conduct a criminal investigation. But that does not mean that everything done by a social worker *must* be for the "overriding purpose" of protecting the child, anymore than it means that everything done by a police officer *must* be for the "overriding purpose" of collecting evidence. Nothing in the statute prohibits social workers from helping collect evidence, and nothing forbids police officers from helping protect children. If six months after T.B. was abused, the prosecutor handling Bobadilla's case asked Molden to help him videotape a statement for the upcoming trial, and Molden complied by questioning T.B. before a video camera, it would be unreasonable to conclude that Molden's "overriding purpose" was to protect T.B. from immediate danger just because Molden was a social worker who had such an obligation under Minn. Stat. § 626.556.

More importantly, even if the statute was the *only* evidence about Molden's purpose – or about the purpose of a reasonable social worker in Molden's position – it would still be objectively unreasonable to conclude that eliciting evidence from T.B. was only an "incidental" purpose of the interview. This is because the statute specifically requires that "the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their

respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews." Minn. Stat. § 626.556, subd. 10(a). In other words, if a social worker such as Molden needs to interview a victim such as T.B. to assess his need for protection, and if a police officer such as Akerson needs to interview a victim such as T.B. as part of his criminal investigation, then the social worker and the police officer are required to coordinate their efforts so that both purposes can be achieved during the same interview. And if a social worker such as Molden needs to interview a victim immediately – before the criminal investigation has commenced – she must, by statute, videotape the statement precisely so that police officers may use that statement in lieu of interviewing the victim a second time.

The Minnesota Supreme Court explained this part of the statutory scheme as follows:

> Avoiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions. That, by statute, the initial risk-assessment interview is recorded does not, therefore, necessarily indicate that the purpose of the interview was to create a formalized statement for trial, Given the clear need to limit a child's exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child,

> there is a compelling need for a single recorded assessment interview solely in order to best protect the health and welfare of the child.

Bobadilla, 709 N.W.2d at 255. The problem with this explanation is that it skips over the reason *why* making a videotape of the assessment interview protects "the health and welfare of the child." It protects the child by minimizing the chances that the child will have to be interviewed a second time, and it minimizes the chances that the child will have to be interviewed a second time by giving law enforcement officers a recorded statement for use in their investigation.

Again, under § 626.556, the social worker's interview of a child is expressly intended to substitute for a separate interrogation by the police. The statute requires the social worker to record the statement because the statute wants the social worker to kill two birds with one stone: The social worker does an immediate interview to determine if action is needed to protect the child from imminent danger, and the social worker records the statement so that the police can use the interview in their investigation. In Justice Page's words, the statute essentially makes the social worker a "surrogate interviewer" for the police. Thus, the statutory scheme – far from suggesting that the *only* purpose of a social worker in interviewing a child is to assess his need for protection – makes it quite clear that the interview is to serve *two*

important purposes: child protection and criminal investigation.

In this case, of course, even if one assumes that Molden initiated the interview with T.B. to assess his need for protection, Molden and Akerson coordinated their fact-finding efforts so that there would be only one interview – an interview that was conducted pursuant to the statute to meet both child-protection and criminal-investigation purposes. Thus, in all legally relevant respects, the interview was not only the functional equivalent of police interrogation. It *was* police interrogation – the one and only interrogation of T.B. Even if the sole purpose of *Molden* was child protection (contrary to her testimony, and contrary to the other evidence), the purpose of the *interview* was both child protection and law enforcement. That's why Akerson was sitting in the room with Molden and T.B.

Before concluding, this Court wishes to note its agreement with the Minnesota Supreme Court on one important point: Nothing in *Crawford* suggests that statements taken during police interrogations are not "testimonial" if the statements are given by young children. To hold that a young child's statement during a police interrogation is "nontestimonial" because of the age of the declarant would require carving out an exception to *Crawford*'s repeated and categorical assertion that statements taken in the course of police interrogations are "testimonial." Such an exception finds no support in the text of *Crawford,* and it would be exceedingly difficult to justify in light of

Crawford's assertions that government involvement in the production of testimony presents a "unique potential for prosecutorial abuse," *Crawford,* 541 U.S. at 56 n.7, and that police interrogations are one of "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford,* 541 U.S. at 68. It would be extraordinary to hold that, notwithstanding the potential for prosecutorial abuse, the Confrontation Clause permits an exception for what is otherwise, without question, "testimonial" hearsay on the sole basis that the declarant is particularly young (and thus more vulnerable to manipulation than an adult). Indeed, this Court is unaware of any case involving *Crawford*-like police interrogation in which the court found an exception to *Crawford* solely on the grounds that the declarant was a young child.[8]

In sum, this Court is generally reluctant to find that any decision of a court as esteemed as the Minnesota Supreme Court is objectively unreasonable,

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[8] It should also be noted that, in *Crawford,* the Supreme Court discussed its prior decision in *White v. Illinois,* 502 U.S. 346 (1992), a case involving out-of-court statements given by a four-year-old victim of sexual abuse to a police officer (and others). *Crawford,* 541 U.S. at 58 n.8 (discussing *White*). Significantly, *Crawford* took as a given that the child's statements to the police officer were "testimonial." *Id.* The Court betrayed no doubt that a four-year-old child gives a "testimonial" statement when she answers the questions of a police officer, underscoring the unqualified nature of *Crawford*'s holding that "interrogations by law enforcement officers fall squarely within" the core class of "testimonial" statements. *Id.* at 53.

even where, as here, that decision was contrary to the overwhelming weight of cases from other jurisdictions. *See Bobadilla,* 709 N.W.2d at 258 (Page, J., dissenting) (citing cases). But *Crawford* was absolutely clear that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." 541 U.S. at 52. And, although *Crawford* did not define "interrogation," it did make clear that it was "us[ing] the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4.[9] For all of the reasons described above, this Court holds that it was objectively unreasonable for the Minnesota Supreme Court to conclude that a recorded interview of a child that was conducted at the request of a police detective, in that detective's presence, at a law-enforcement center, by a government actor specially trained in the forensic interviewing of children, pursuant to a statutory scheme requiring the police and the social-welfare agency to combine their investigatory efforts, that took place five days after the event that was being investigated, when the child was clearly not in any immediate danger, and that involved using highly structured questioning to elicit a statement

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[9] Thus it is quite clear that a witness need not be suspected of a crime, or charged with a crime, or taken into custody, or given *Miranda* warnings before an interview of that witness is deemed to be an "interrogation" under *Crawford*.

inculpating a suspect, was not a "police interrogation" within the meaning of *Crawford*.[10]

C. Harmless Error

This Court must finally assess whether the Minnesota Supreme Court's error was harmless.[11] The

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[10] It is somewhat unclear whether certain assertions of the Minnesota Supreme Court were factual findings or legal conclusions. That is particularly true with respect to the assertion on which its ultimate holding depended: that Molden's "main" purpose in questioning T.B. was assessing imminent risks to his health, and that eliciting evidence was at most an "incidental" purpose. Given that the Minnesota Supreme Court described this as an "objective" inquiry, and given that the court's conclusion about Molden's purpose rested almost entirely on its interpretation of a statute, this Court holds that the court's decision was "an unreasonable application of[] clearly established Federal law" for purposes of § 2254(d)(1). But to the extent that the Minnesota Supreme Court's decision rests on what might be considered findings of fact, this Court holds that the court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" for purposes of § 2254(d)(2).

[11] The Minnesota Supreme Court did not address whether any Confrontation Clause error was harmless. But the court rejected one of Bobadilla's state-law challenges to the admission of the social worker's testimony on the ground that the error, if any, was harmless given that the jury saw the videotape. *Bobadilla*, 709 N.W.2d at 256. Obviously, because that reasoning rests on the erroneous assumption that the admission of the videotape was proper, this Court need not defer to it. *Cf. Fry v. Pliler*, 127 S. Ct. 2321, 2326 (2007) (noting that, when a state court determines that a constitutional violation was harmless, a federal court may not award habeas relief unless the harmlessness determination itself was unreasonable).

standard applicable on habeas review of a state-court decision is whether "the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Toua Hong Chang v. Minnesota,* 521 F.3d 828, 832 (8th Cir. 2008) (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993)).

> A substantial and injurious effect occurs when the court finds itself in grave doubt about the effect of the error on the jury's verdict. Grave doubt exists where the issue of harmlessness is so evenly balanced that the court feels itself in virtual equipoise as to the harmlessness of the error.

Id. (quotations, citations, and brackets omitted). To consider whether the admission of the evidence had "a substantial and injurious effect or influence in determining the jury's verdict," the court considers the following factors: (1) the importance of the evidence to the prosecution's case; (2) whether the evidence was cumulative; (3) the presence or absence of corroborating or contradictory evidence; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Id.* at 832-33.

Under this standard, this Court is unable to say that the admission of Maiden's testimony and the videotaped interview of T.B. were harmless. Although the prosecution offered other evidence of Bobadilla's guilt – most significantly, T.B.'s mother's testimony about T.B.'s statement describing the assault, as well as the doctor's testimony about an unusual erythema

around T.B.'s rectum – the videotaped interview and Maiden's testimony were clearly very important (and likely crucial) to the prosecution's case. The first two pieces of evidence that the prosecutor presented to the jury in her case-in-chief were Molden's testimony and the videotape of her interview of T.B. The prosecutor discussed the videotape extensively in her opening statement, calling it "[T.B.]'s opportunity to talk to you," and asking the jury to pay close attention to T.B.'s demeanor during the interview. TT 106. T.B.'s statements during the interview were more detailed than his bare-bones statement to his mother, and having a videotape of the interview gave the jury the chance to actually see and hear T.B. Moreover, given Molden's special expertise in conducting forensic interviews of children, the jury would likely have given her testimony about the interview (as well as the interview itself) great weight in its deliberations. Finally, Bobadilla was obviously completely precluded from cross-examining T.B. For these reasons, this Court finds that there is at least grave doubt about the effect of the error on the jury's verdict. The Court therefore grants Bobadilla's petition for a writ of habeas corpus and vacates his conviction.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, the Court DECLINES

TO ADOPT the March 25, 2008 R&R [Docket No. 34]. IT IS HEREBY ORDERED THAT:

1. Petitioner's amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [Docket No. 9] is GRANTED.

2. The judgment and sentence in *State of Minnesota v. Orlando Manuel Bobadilla,* Case No. 34-K6-03-000942, Kandiyohi County District Court, is VACATED.

3. Petitioner shall be released unless the State of Minnesota takes affirmative steps to reinstitute a criminal prosecution of petitioner within sixty days.

4. Petitioner's objection [Docket No. 32] to the order denying his motions for an evidentiary hearing and for leave to appear at oral argument [Docket No. 31] is OVERRULED as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 16, 2008

/s/ Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

* * * * * * * * * * * * * * * * * *

Orlando M. Bobadilla,

Petitioner,

vs.

Terry Carlson, Warden,

Respondent.

REPORT AND RECOMMENDATION

Civ. No. 07-1649 (PJS/RLE)

* * * * * * * * * * * * * * * * * *

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(B), upon a Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. §2254.

The Petitioner Orlando M. Bobadilla ("Bobadilla") appears by Lynne A. Torgerson, Esq., and the Respondent Terry Carlson appears by Kimberly R. Parker, Assistant State Attorney General.

For reasons which follow, we recommend that the Petition for a Writ of Habeas Corpus be denied.

II. Facts and Procedural Background

Bobadilla is a State prisoner, who is currently serving a 144-month sentence at the Minnesota Correctional Facility, in Moose Lake, Minnesota

("MCF-ML"). The sentence resulted from Bobadilla's conviction, by a Jury, on September 4, 2003, in the Kandiyohi County District Court, on one (1) Count of Criminal Sexual Conduct in the First Degree, for the sexual penetration of a minor under thirteen (13) years of age, in violation of Minnesota Statutes Section 609.342, Subdivisions 1(a), and 2, and one Count of Criminal Sexual Conduct in the Second Degree, for sexual contact with a minor under thirteen (13) years of age, in violation of Minnesota Statutes Section 609.343, Subdivisions 1(a), and 2(a). See, *Amended Petition, Docket No. 9,* at 1. The facts which led to Bobadilla's conviction were summarized by the Minnesota Supreme Court, in Bobadilla's direct appeal, as follows:

> On Friday afternoon, May 2, 2003, 3-year-old T.B. was dropped off by his mother for a weekend visit with his father, who was then residing with several relatives, including T.B.'s uncle, 23-year-old respondent Orlando Bobadilla. T.B.'s mother worked a 3:00 p.m.-11:00 p.m. shift on weekends, and following the end of her shift on Sunday, May 4, 2003, she picked up T.B. sometime after 11:00 p.m.
>
> As T.B.'s mother was readying T.B. for bed and changing his pull-up diaper, she "noticed that his bottom was a little red" and asked him what had happened. He became nervous and started playing with his hair. She told him that she was his mother and that he could tell her anything. T.B. then told her that "his Uncle Orlando had put his finger in

his 'booty,'" T.B.'s word for buttocks. T.B.'s mother said "okay," finished changing him, and sent him off to his room. She then phoned T.B.'s father and reported what T.B. had said. After hearing of T.B.'s story, T.B.'s grandmother decided that they should take him to the hospital. As T.B. and his mother were waiting to be picked up to go to the hospital by T.B.'s father and grandmother, T.B.'s mother asked him if he had asked Bobadilla to stop. T.B. indicated that he had, and that Bobadilla had said he was sorry.

T.B.'s parents brought T.B. into the hospital's emergency room where he was examined by an emergency-room physician. After talking to T.B.'s parents, the physician conducted a full-body examination of T.B., and observed an abnormal erythema, or redness, around his rectum. The physician saw no ulcerations or lesions, which would have indicated a chronic problem, and believed the erythema was consistent with what the child had disclosed.

A Willmar Police Department officer was dispatched to the hospital on an assault report. The officer initially met with the emergency room nurse and then with T.B.'s parents. After doing so, the officer forwarded his report to both the Investigations Unit of the police department and the Kandiyohi County Family Service Department. Over the next several days, a Kandiyohi County child-protection worker from the Family Service Department tried a number of times to

contact T.B.'s mother by phone, finally connecting with her on May 9, 2003. The child-protection worker arranged to have T.B. interviewed that day at the law enforcement center.

T.B. and his parents arrived at the law enforcement center at approximately 1:30 p.m. The child-protection worker and a Willmar police detective, out of uniform, met the family and escorted them to the interview room. The interview room, called the "child friendly room," was specifically used for interviewing children and featured a video camera that recorded the exchange from behind a one-way mirror. The detective did not participate in the interview, but observed, sitting across from the child-protection worker and T.B. The child-protection worker conducted the interview using the CornerHouse protocol, which she described as a technique "specifically geared towards interviewing children who have been victims of sexual abuse." The protocol consists of establishing rapport with the child, ascertaining the child's terms for parts of the anatomy, ascertaining whether abuse occurred, and closing with a "safety message." The CornerHouse technique instructs the interviewer to ask nonleading questions, to use terms children would understand, and to progress quickly since young children have short attention spans.

The child-protection worker began the interview by asking T.B. about his parents and

she then drew pictures of them. Next, using a diagram of a male, she had T.B. identify his names for various parts of the anatomy, starting with the head and moving down. Then the following exchange occurred:

Child-Protection Worker [("CPW")]: [H]as anybody hurt your body?

T.B.: Mmm, MmmMmm (affirmative)

CPW: Yeah. Who hurt your body?

T.B.: Orlando did.

CPW: Orlando did * * * How did Orlando hurt your body?

T.B.: He (inaudible) my (inaudible).

CPW: What?

T.B.: He, he (inaudible) touch my (inaudible).

CPW: (inaudible) your bootie. Okay. What did he do to your bootie?

T.B.: (inaudible) put his finger in there.

CPW: He just put his finger in there? Okay * * * .

T.B. then identified what he meant by "booty" by pointing to the buttocks area on the diagram the child-protection worker had provided.

The child-protection worker asked T.B. where he and Bobadilla were at the time of the incident, and T.B. said they were in his

> father's room. She asked where his father was while it happened. T.B. said that his father had gone downstairs and then come upstairs, but he also said "yeah" when asked if his father had seen it happen. Then the child-protection worker asked him if he would show her what had happened using an anatomically correct doll. He said he would, but ultimately did not. She also asked if Orlando touched him on his skin or on his clothes, and T.B. replied, "My skin." The child-protection worker then closed the interview by telling T.B. that what had happened was not okay, and that he should tell someone, like his mother, if something similar ever happened again.

State v. Bobadilla ("Bobadilla II"), 709 N.W.2d 243, 246-247 (Minn. 2006), cert. denied, ___ U.S. ___, 127 S.Ct. 382 (2006).[1] At Bobadilla's criminal Trial, the Court found T.B. incompetent to testify. *Id.* at 248. However, the Court concluded that T.B.'s statements to his mother, and the child-protection

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[1] The Record before us contains no testimony, or other evidence, which would rebut, by clear and convincing evidence, the presumption of correctness in the State Court's factual findings. See *Title 28 U.S.C. §2254(e)(1)*; *Guinn v. Kemna*, 489 F.3d 357, 359 (8th Cir. 2007); *Lupien v. Clarke*, 403 F.3d 615, 618 (8th Cir. 2005); *Green v. Norris*, 394 F.3d 1027, 1029 (8th Cir. 2005). Accordingly, for the purposes of this Petition, we accept, as our factual Record, those facts which were set forth by the Minnesota Supreme Court in *State v. Bobadilla ("Bobadilla II")*, 709 N.W.2d 243, 246-247 (Minn. 2006), cert. denied, ___ U.S. ___, 127 S.Ct. 382 (2006).

worker ("CPW"), "were sufficiently reliable to permit their admission as substantive evidence under the hearsay exception embodied in Minn. Stat. §595.02, subd. 3 (2004)."[2] *Id.* Accordingly, the Court "allowed both T.B.'s mother and the child-protection worker to testify about T.B.'s statements, and also allowed the state to show the videotape of T.B.'s interview." *Id.* Bobadilla also testified at the Trial, and denied the allegations. *Id.*

Following his conviction, Bobadilla filed a direct appeal with the Minnesota Court of Appeals, raising several evidentiary challenges. See, *State v. Bobadilla ("Bobadilla I"),* 690 N.W.2d 345 (Minn. App. 2004). Although the Court rejected most of Bobadilla's claims, it concluded that the admission of T.B.'s videotaped statement had violated Bobadilla's Sixth Amendment rights, pursuant to the Confrontation Clause, thereby entitling Bobadilla to a new Trial. *Id.* at 350, citing *Crawford v. Washington,* 541 U.S. 36 (2004).[3]

The Court found that the CPW had interviewed T.B. in order to develop a case against Bobadilla,

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[2] Minnesota Statutes 595.02, Subdivision 3, prescribes a procedure, by which out-of-court statements, which are made by children under the age of ten (10), and which concern allegations of sexual abuse, may be admissible in Court as substantive evidence, if the Court fords sufficient indicia of reliability.

[3] The United States Supreme Court issued its decision, in *Crawford v. Washington,* 541 U.S. 36 (2004), after Bobadilla's conviction, but before the Minnesota Court of Appeals considered his direct appeal.

which rendered T.B.'s statements testimonial in nature, under *Crawford. Id.* at 349. Accordingly, because T.B. was unavailable as a witness, and because Bobadilla did not have a prior opportunity to cross-examine T.B., the Court vacated Bobadilla's conviction and ordered a new Trial. *Id.* at 350, citing *Crawford v. Washington,* supra at 68. In addition, the Court ruled that, "because T.B.'s videotaped interview was inadmissible under Crawford, the trial court also abused its discretion in allowing the child-protection worker to testify about the contents of that interview." *Id.*[4]

Following an appeal by the State, the Minnesota Supreme Court reversed the decision of the Minnesota Court of Appeals, and reinstated Bobadilla's conviction. See, *Bobadilla II*, supra at 246, The Court observed that "Crawford's Confrontation Clause test bars at trial all 'testimonial' out-of-court statements when the accused is not afforded 'a prior opportunity to cross-examine' the declarant," *Id.* at 249, citing *Crawford v. Washington,* supra at 61. Since there was

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[4] The Minnesota Court of Appeals rejected Bobadilla's argument, that the Trial Court erred in admitting T.B.'s statement to his mother, because it concluded that the statement was not testimonial, given that "T.B.'s mother questioned T.B. about the redness around his anus out of concern for his health, not because she expected to develop a case against Bobadilla." *Bobadilla I,* supra at 350. Accordingly, the Court concluded that the Trial Court had properly followed the procedures of Minnesota Statutes Section 595.02, Subdivision 3, for admitting T.B.'s out-of-Court statement to his mother.

no dispute that T.B. had not been subject to cross-examination, the Court observed that its only inquiry would be "whether T.B.'s statements in the interview with the child-protection worker were 'testimonial' under Crawford." *Id.* The Court then outlined eight (8) factors, for determining whether a statement is "testimonial," under *Crawford,* as follows:

> (1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded.

Id. at 250, citing *State v. Wright,* 701 N.W.2d 802, 812-13 (Minn. 2005). The Court observed that the second and seventh factors "were the central considerations," while "the other six factors are probative of these two." *Id.*

The Court then noted "that the key to determining whether a statement is testimonial is whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement

for trial." *Id.* at 252 [citation omitted]. Accordingly, the Court focused its inquiry on "whether a reasonable government questioner or declarant in the relevant situation would exhibit that purpose," *id.* at 253, and reiterated that an inquiry should not be made into the "subjective motivations of declarants or questioners, because Crawford explained that 'only cross-examination' can reveal a declarant's subjective perception of his or her situation." *Id.*, citing *Crawford v. Washington,* supra at 66.

After canvassing the case law, with respect to child-declarants, the Court concluded that "in this case, neither the child-protection worker nor the child declarant, T.B., were acting, to a substantial degree, in order to produce a statement for trial." *Id.* at 254. The Court noted that neither party disputed that T.B. was interviewed, pursuant to Minnesota Statutes Section 626.556, which requires certain individuals to "report the maltreatment of minors either to law enforcement or to the local welfare agency." *Id.* Under that statute, "the local welfare agency shall immediately conduct an assessment including gathering information, on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." *Id.*, quoting Minnesota Statutes Section 626.556, Subdivision 10(a).

The Court explained that the statute also requires that, "[t]o the extent that an allegation of

abuse alleges a violation of a criminal statute, the local welfare agency and law enforcement must 'coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews,'" and prepare separate reports. *Id.*, quoting *Minnesota Statutes Section 626.556, Subdivision 10(a).* In addition, the statute requires the local welfare agency "to use a 'nondirective' question-and-answer format and to make audio-video recordings of the interviews of alleged victims of sexual abuse." *Id.*, citing *Minnesota Statutes Section 626.556, Subdivision 10(j)(2).*

Accordingly, the Court concluded that "the interview of T.B. was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child." *Id.* at 255. In so deciding, the Court found that "[t]he clearly delineated purpose of this statutory scheme is to protect the health and welfare of children," *id.* at 254, citing *Minnesota Statutes Section 626.556, Subdivision 1,* as compared to "statutory interviewing scheme[s] * * * designed with the express purpose of facilitating the creation of out-of-court statements for a future trial." *Id.* at 255, distinguishing *Snowden v. State,* 846 A.2d 36, 47 (Md. App. 2004) (concluding that "[t]he children were interviewed for the expressed purpose of developing their testimony * * * , under the relevant Maryland statute that provides for the testimony of

certain persons in lieu of a child, in a child sexual abuse case."), aff'd, 867 A.2d 314 (Md. 2005). The Court went on to find that, "[i]f part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to T.B.'s health and welfare." *Id.*

On October 10, 2006, the United States Supreme Court denied Bobadilla's Petition for a Writ of Certiorari. See, *Bobadilla v. Minnesota,* ___ U.S. ___, 127 S.Ct. 382 (2006). Thereafter, on May 4, 2007, Bobadilla filed an Amended Application for Habeas Corpus under Title 28 U.S.C. §2254, alleging that he was unlawfully convicted, in violation of *Crawford*; on the basis of inadmissible testimony – namely, T.B.'s videotaped statements – and that there was otherwise insufficient evidence to sustain his conviction.[5] See, *Amended Petition, Docket No. 9,* at 4; *Petitioner's Memorandum in Support, Docket No. 10,* at 17, 24.

For his part, the Respondent argues that the Minnesota Supreme Court's decision was neither contrary to nor an unreasonable application of *Crawford,* and therefore, he asks that we deny Bobadilla's

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[5] The Petitioner originally filed an Application for Habeas Corpus on March 26, 2007, see, *Docket No. 1,* and subsequently, filed a Motion seeking an extension of time in which to amend that Petition. See, *Docket No. 4.* By Order dated April 6, 2007, see, *Docket No. 8,* we granted the Petitioner leave to amend his Petition, and we accepted the submission, which is dated May 4, 2007, as his Final Amended Petition. See, *Docket No. 9.*

Petition. See, *Respondent's Memorandum in Opposition, Docket No. 15,* at 1-2. We address the parties' arguments in turn.

III. Discussion

A. *Standard of Review.* "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution, or laws or treaties of the United States." *Title 28 U.S.C. §2254(a).* "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 68 (1991). As a result, before a Writ may issue, a petitioner must establish that the State's exercise of custody over his person is an affront to the Constitution, a Federal law, or a Federal treaty. *Id.*; see also, *Lupien v. Clarke,* 403 F.3d 615, 619 (8th Cir. 2005); *Newton v. Kemna,* 354 F.3d 776, 782 (8th Cir. 2004), cert. denied, 543 U.S. 979 (2004); *Robinson v. Leapley,* 26 F.3d 826, 829 (8th Cir. 1994).

In 1996, Congress restricted the scope of a Federal Court's review of Habeas Petitions, where the underlying claims were adjudicated in State Court. See, *Antiterrorism and Effective Death Penalty Act of 1996,* Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"); see also, *Lockyer v. Andrade,* 538 U.S. 63, 70 (2003) ("AEDPA circumscribes a federal habeas

court's review of a state court decision."). A Federal Court's authority to vitiate State Court decisions, by the granting of a Writ of Habeas Corpus, is now limited to the narrow class of claims which have been fully exhausted in the State Courts, and which involve an adjudication that either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

Title 28 U.S.C. §2254(d). The Supreme Court has determined that the "contrary to," and "unreasonable application" clauses of Section 2254(d)(1), present two separate grounds on which a Federal Court may grant Habeas relief to claims adjudicated in the State Courts. See, *Williams v. Taylor,* 529 U.S. 362 (2000). The Court has explained, as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrive[d] at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decide[d] a case differently than [the Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the

> writ if the state court identifie[d] the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applie[d] that principle to the facts of the prisoner's case.

Id. at 412-13. The Court further explained that a consideration of a State Court's decision, under the "unreasonable application" clause, requires a Federal Court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409; see also, *Underdahl v. Carlson,* 462 F.3d 796, 798 (8th Cir. 2006); *Davis v. Norris,* 423 F.3d 868, 874-75 (8th Cir. 2005); *LaFrank v. Rowley,* 340 F.3d 685, 689 (8th Cir. 2003), cert. denied, 541 U.S. 950 (2004).

Under this heightened standard of review, a Federal Court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly," but "[r]ather, that application must also be unreasonable." *Id.* at 411; see also, *Davis v. Norris,* supra at 875; *Siers v. Weber,* 259 F.3d 969, 972-73 (8th Cir. 2001) (examining the impact of *Williams* on Habeas proceedings), cert. denied, 534 U.S. 1138 (2002); *Newman v. Hopkins,* 247 F.3d 848, 850-51 (8th Cir. 2001), cert. denied, 536 U.S. 915 (2002); *Copeland v. Washington,* 232 F.3d 969, 973 (8th Cir. 2000), cert. denied, 532 U.S. 1024 (2001).

As a consequence, *Williams* affirmed the distinction, which had previously been drawn by several

Circuit Courts, that the "contrary to" clause was to be used in cases addressing pure questions of law and mixed questions of law and fact, whereas the "unreasonable application" clause addressed factual determinations. See, e.g., *Evans v. Rogerson,* 223 F.3d 869, 872 (8th Cir. 2000) (the "in custody" determination for *Miranda* purposes is a question of law subject to the first prong of Section 2254(d), when the relevant facts are undisputed). Therefore, when a petitioner argues that the State Court improperly applied clearly established Supreme Court law to a particular set of facts, the Federal Courts may not grant a Writ absent a finding that such an application was unreasonable. "'[O]bjectively unreasonable' does not mean 'clear error,' because '[t]hese two standards * * * are not the same,'" and "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *LaFrank v. Rowley,* supra at 689, quoting *Lockyer v. Andrade,* supra at 75.

Additionally, Section 2254(e)(1) retains a presumption of correctness for all purely factual determinations rendered by a State Tribunal, which can, as a result, only be rebutted by the production of clear and convincing evidence to the contrary. See, *Guinn v. Kemna,* 489 F.3d 357, 359 (8th Cir. 2007); *Lupien v. Clarke,* supra at 618; *Green v. Norris,* 394 F.3d 1027, 1029 (8th Cir. 2005). Despite this presumption, Section 2254(d)(2) authorizes the issuance of a Writ if the State Court Judgment "resulted in a decision that was based on an unreasonable determination of the

facts in light of the evidence presented in the State court proceeding." *Kinder v. Bowersox,* 272 F.3d 532, 538 (8th Cir. 2001); *McDonald v. Bowersox,* 101 F.3d 588, 592 (8th Cir. 1996) ("[W]e presume state court findings of fact to be correct in habeas proceedings unless the petitioner establishes, the respondent admits, or the record shows otherwise."), cert. denied, 521 U.S. 1127 (1997). Thus, "[f]actual findings by the state court 'shall be presumed to be correct,' a presumption that will be rebutted only 'by clear and convincing evidence.'" *Kinder v. Bowersox,* supra at 538, citing *Title 28 U.S.C. §2254(e)(1).*

B. *Legal Analysis.* In his direct appeal, and now in his Petition for Habeas relief, Bobadilla argues that he was deprived of his Sixth Amendment right to confront T.B., when the Trial Court admitted T.B.'s videotaped statements into evidence.

The Confrontation Clause of the Sixth Amendment mandates as follows: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]" *United States Constitution, Amendment VI.* At the outset, we observe that both the Minnesota Court of Appeals, and the Minnesota Supreme Court, correctly identified *Crawford v. Washington,* supra, as the Supreme Court precedent which controlled Bobadilla's constitutional challenge to his conviction.[6] In *Crawford* the

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[6] We reject the Respondent's contention, that *Crawford* is inapplicable to Bobadilla's case. The United States Supreme

(Continued on following page)

United States Supreme Court held that testimonial statements may not be admitted at Trial, "unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine her." *United States v. Bordeaux,* 400 F.3d 548, 555 (8th Cir. 2005), citing *Crawford v. Washington,* supra. In *Crawford,* the defendant was accused of stabbing a man, in the presence of his wife, Sylvia, and the testimonial statement at issue was Sylvia's tape-recorded statement to the police, in which she described the crime. See, *Crawford v. Washington,* supra at 38. After the defendant invoked his marital privilege, so as to preclude Sylvia from testifying at his Trial, the Trial Court admitted the tape-recorded statement into evidence. *Id.* at 40. Pursuant to the defendant's direct

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Court has affirmatively ruled that *Crawford* announced a new rule of criminal procedure, but that it did not meet the criteria for retroactive application to cases on collateral review, under the standard of *Teague v. Lane,* 489 U.S. 288 (1989). See, *Wharton v. Bockting,* ___ U.S. ___, 127 S. Ct. 1173, 1181-83 (2007). Here, *Crawford* was decided while Bobadilla's direct appeal was pending before the Minnesota Court of Appeals. See, *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987) (holding that new rules for the conduct of criminal prosecutions are only to be applied retroactively to cases pending on direct review or not yet final). Accordingly, Bobadilla's conviction was not yet final, and *Crawford* applies to his case, as correctly noted by both the Minnesota Court of Appeals, and the Minnesota Supreme Court. See, *Griffith v. Kennel* supra at 321 n. 6 ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.") [citations omitted].

appeal, the Supreme Court granted certiorari and reversed his conviction, after concluding that the admission of the tape-recorded statement violated the Confrontation Clause. *Id.* at 68.

In so ruling, the Supreme Court examined the history of the Confrontation Clause, and the underlying common law rights, and determined that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. The Court further determined that "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee." *Id.* at 61. Accordingly, the Court overruled the holding of *Ohio v. Roberts,* 448 U.S. 56 (1980), insofar as that precedent related to testimonial statements. *Id.* at 67. Under *Roberts,* hearsay could be admitted, following a judicial determination that such hearsay bore adequate "indicia of reliability." *Id.* Instead, the *Crawford* Court held that, when a witness is unavailable at Trial, that witness's **testimonial** hearsay will only be admitted when its "reliability [has been] assessed in a particular manner: by testing in the crucible of cross-examination," *Id.* at 61.

In its ruling, the *Crawford* Court noted that "testimony" is "typically [defined as] 'a solemn declaration of affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51, quoting *2 N. Webster, An American Dictionary of the English Language (1828).* It further observed that "[v]arious

formulations of this core class of 'testimonial' statements exist," including the following proposed definitions:

> "[*E*]*x parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements * * * contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); [or] 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

Id. at 51-52. Nonetheless, the *Crawford* Court expressly declined to "spell out a comprehensive definition of 'testimonial,'" *id.* at 68, thereby leaving lower Courts to grapple with the issue. However, the Court stated that testimonial hearsay included, "at a minimum * * * prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and * * * police

interrogations."[7] *Id.* The Court further advised it "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at 53 n. 4.

Here, there is no contention that Bobadilla had any prior opportunity to cross-examine T.B., nor is there any dispute that T.B. was found incompetent to testify, and therefore, was unavailable at Trial. Accordingly, the sole issue before us is the Minnesota Supreme Court's determination that T.B.'s videotaped statements were not testimonial, under *Crawford v. Washington*. With the foregoing as our backdrop, we turn to consider Bobadilla's argument, that the Minnesota Supreme Court applied a subjective standard, which was contrary to the Supreme Court's holding in *Crawford,* or alternatively, that the Minnesota Supreme Court unreasonably applied the standard imposed by *Crawford*.

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[7] The *Crawford* Court observed that the common law right of confrontation had developed against magistrates and justices of the peace, who conducted examinations, "but had an essentially investigative and prosecutorial function," given that "England did not have a professional police force until the 19th century[.]" See, *Crawford v. Washington,* supra at 53 [citation omitted]. In its consideration of police interrogations, the *Crawford* Court stated that "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace[,]" *id.*, presumably referring to the risk of one-sided interrogation. *Id.* at 56 n. 7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse[.]").

1. *The "Contrary To" Clause.* We need only briefly address Bobadilla's assertion that the Minnesota Supreme Court's decision was contrary to the Supreme Court's holding in *Crawford v. Washington.* See, *Title 28 U.S.C. §2254(d)(1).* Bobadilla argues that the Minnesota Supreme Court considered the subjective intent of T.B., in making the videotaped statement, as well as the CPW, in obtaining that statement, and he contends that this consideration of subjective intent is contrary to the holding of *Crawford.* Bobadilla's argument is without merit.

First, the Minnesota Supreme Court explicitly stated that its inquiry was objective, rather than subjective, as follows:

> Whether a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial is determined by asking whether a reasonable government questioner or declarant in the relevant situation would exhibit that purpose. We make this inquiry, as opposed to an inquiry into the subjective motivations of declarants or questioners, because Crawford explained that "only cross-examination" can reveal a declarant's subjective perception of his or her situation. 541 U.S. at 66, 124 S.Ct. 1354. In, addition, this approach is consistent with our reasoning in [State v. Wright, 701 N.W.2d 802 (Minn. 2005),] in which we looked to the likely motivations of reasonable people in the relevant situations, see 701 N.W.2d at 811, 813-14, but rejected an

> inquiry that hinged on the perspective of an objectively situated person who was unaffected by the context in which the statement was made, see id. at 814. In so doing, we explained that the latter approach would be overbroad, and would improperly ignore statements' "interrogative qualities," or the contextual aspects of the questioning. Id. Finally, we note that an inquiry into the purpose of a reasonable government questioner or declarant in the relevant situation also conforms with Crawford's core categories of testimonial statements * * * since a reasonable questioner taking a statement in any one of those situations would always exhibit a substantial concern with producing a statement for use in legal proceedings. 541 U.S. at 68, 124 S.Ct. 1354.

Bobadilla II, supra at 253. Here, the Minnesota Supreme Court concluded that neither the CPW nor T.B. "were acting, to a substantial degree, in order to produce a statement for trial." *Id.* at 254. However, the Court reached that conclusion within the context of the statutory scheme of Minnesota Statutes Section 626.556, the purpose of which is to "repor[t], investigat[e], and respon[d] to threats to children's health or welfare." *Id.*

Contrary to Bobadilla's assertions, the Minnesota Supreme Court made no mention of the subjective intentions of either T.B., or the CPW. Instead, it considered the declarant's purpose, and the interviewer's purpose, from an objective standpoint –

and that inquiry into purpose was contemplated by the *Crawford* Court. See, *Crawford v. Washington*, supra at 56 n. 7 ("Involvement of government officers in the production of testimony with **an eye toward trial** presents unique potential for prosecutorial abuse[.]") [emphasis added].

We acknowledge the language of the Minnesota Supreme Court that, "given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial." *Id.* at 255. However, we reject Bobadilla's argument, that the statement is evidence that the Minnesota Supreme Court improperly focused on T.B.'s subjective intentions, because the Court continued its analysis by stating that "children of T.B.'s age are simply unable to understand the legal system and the consequences of statements made during the legal process." *Id.* at 256. Accordingly, it is plain from the text of its opinion that the Minnesota Supreme Court was considering the objective purpose of a three-year-old declarant – i.e., the reasonable child – rather than T.B.'s subjective intent. Compare, *Crawford v. Washington,* supra at 52 (observing that one possible definition of "testimonial" would include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," without mention of any standard for

child-declarants) [citation omitted],[8] with *People v. Sisavath,* 118 Cal.App.4th 1396, 1402 n. 3 (Cal. App. 2004) ("Conceivably, the Supreme Court's reference to an 'objective witness' should be taken to mean an objective witness in the same category of persons as the actual witness – here, an objective four year old[,]" "[b]ut we do not think so."), and *State v. Snowden,* 867 A.2d 314, 329 (Md. 2005) ("[W]e are satisfied that an objective test, using an objective person, rather an objective child of that age, is the appropriate test for determining whether a statement is testimonial in nature.").

Here, it appears that the Minnesota Supreme Court took the position which was rejected by the California Court of Appeals in *Sisavath,* by concluding that it should consider the perspective of an objective child-declarant, with the relevant age and experience, rather than the perspective of an objective adult, who is observing the interview. Cf., *People v. Sisavath,* supra at 1402 n. 3 (concluding

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[8] Bobadilla incorrectly asserts that this definition of "testimonial statements" was part of the *Crawford* Court's explicit holding. See, e.g., *Petitioner's Memorandum in Support, Docket No. 10,* at 14, 17, 18. As noted in the text of this Opinion, however, Bobadilla has simply identified **one** of the several proposed definitions of "testimonial statements" which were mentioned, but not endorsed, by the *Crawford* Court. See, *Crawford v. Washington,* supra at 51-52. Notwithstanding Bobadilla's assertion, the *Crawford* Court did **not** adopt that definition of testimonial statement – instead, it explicitly "refus[ed] to articulate a comprehensive definition" of the term. *Id.* at 68 n. 10.

that the *Crawford* Court "meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an **objective observer,** then the statement is testimonial.") [emphasis added].

Although Bobadilla may prefer the formulation of the *Sisavath* and *Snowden* Courts, he has not shown that the Minnesota Supreme Court applied a standard which was contrary to clearly established precedent. Nothing in *Crawford v. Washington* barred the consideration of "the limited cognitive and developmental skills of young children" when contemplating the purpose of out-of-Court statements. See, *State v. Snowden,* supra at 328, citing the amicus brief of the American Prosecutors Research Institute; and compare *Bobadilla II,* supra at 256, also citing the amicus brief of the American Prosecutors Research Institute. Accordingly, we find no responsible ground upon which to grant Bobadilla's Petition on this basis.[9]

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[9] We similarly reject Bobadilla's bald assertion that the Minnesota Supreme Court "arrived at a conclusion opposite to that reached by the [United States] Supreme Court on a question of law." See, *Petitioner's Reply, Docket No. 18,* at 8-9. As correctly noted by the Respondent, the United States Supreme Court has not yet considered the application of *Crawford* to a child-declarant's statements to a child-protection worker. See, *Respondent's Memorandum in Opposition,* supra at 11 n. 5. Accordingly, the Minnesota Supreme Court did not "decid[e] a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, supra at 412-13.

(Continued on following page)

2. *The "Unreasonable Application" Clause.* We turn, then, to the crux of Bobadilla's argument, which is that the Minnesota Supreme Court unreasonably applied *Crawford* when it concluded that T.B.'s videotaped statements were not testimonial. We disagree, and conclude that the Minnesota Supreme Court's interpretation of *Crawford,* and its determination that T.B.'s statement was not testimonial, were not objectively unreasonable.

We first note that both parties have relied upon the Supreme Court's later decision in *Davis v. Washington,* 547 U.S. 813 (2006), to support their respective positions. See, *Respondent's Memorandum in Opposition,* supra at 14; *Petitioner's Reply, Docket No. 18,* at 19. In *Davis,* the Supreme Court refined its decision in *Crawford,* by holding as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

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Moreover, to the extent that Bobadilla asserts that a State Court's decision is "contrary to" Federal law if it "is simply 'erroneous' or wrong," see, *Petitioner's Reply,* supra at 6, quoting *Williams v. Taylor,* supra at 388, he is incorrect. Bobadilla quotes a portion of *Williams,* which was adopted by only four (4) members of the Supreme Court. As explained in the text of this Opinion, the majority of the *Williams* Court reached the opposite conclusion, in holding "that an **unreasonable** application of federal law is different from an **incorrect** application of federal law." *Id.* at 410 [emphasis in original].

> emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 2273-74 [footnote omitted]. In a footnote, the Court further explained that, "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 2274 n. 1.

Here, as previously noted, we are not deciding whether T.D.'s videotaped statements were, or were not, testimonial, under either *Crawford* or *Davis*. Instead, we consider only whether the Minnesota Supreme Court's determination was objectively unreasonable under what was then clearly established Federal law – i.e., *Crawford,* not *Davis*. The Supreme Court did not issue its decision in *Davis* until after the Minnesota Supreme Court affirmed Bobadilla's conviction in *Bobadilla II*. Accordingly, we decline to consider whether the Minnesota Supreme Court's decision was objectively reasonable, in light of Supreme Court precedent which was not available for that Court's consideration. See, *Osborne v. Purkett,* 411 F.3d 911, 914 (8th Cir. 2005) ("[A] federal court may not grant the petition unless the state-court decision, viewed objectively and on the merits, cannot be justified under **existing** Supreme Court precedent.") [emphasis added], cert. denied, 547 U.S. 1022 (2006),

citing *James v. Bowersox,* 187 F.3d 866, 869 (8th Cir. 1999), cert. denied, 528 U.S. 1143 (2000); *Brown v. Greiner,* 409 F.3d 523, 533 (2nd Cir. 2005) ("Later Supreme Court decisions play no role in assessing the reasonableness of the state court decisions.") [footnote omitted]. At the time of its decision, the Minnesota Supreme Court had the benefit of the Supreme Court's decision in *Crawford,* and that, alone, constitutes the "clearly established Federal law" underlying Bobadilla's present Petition.

We next acknowledge the decision of our Court of Appeals, in *United States v. Bordeaux,* supra. In *Bordeaux,* the defendant was convicted of the aggravated sexual abuse of a child, after the Trial Court admitted a similar, videotaped statement, in which the victim, AWH, described the defendant's conduct, while being interviewed by a "forensic interviewer." *Id.* at 555. On direct appeal, our Court of Appeals reversed the conviction, after concluding that the admission of the videotape had violated the defendant's rights under the Confrontation Clause. The *Bordeaux* Court found that, as with a police interrogation, the interview of AWH had involved formal questioning, and a government official. *Id.* at 556. Moreover, the *Bordeaux* Court concluded that the purpose of the interview "was to collect information for law enforcement," notwithstanding the fact that "AWH's statements may have also had a medical purpose[.]" *Id.* It further observed that "logic does not dictate, that multi-purpose statements cannot be testimonial." *Id.*

Although the facts of *Bordeaux* are analogous to the facts which supported Bobadilla's conviction, the procedural posture of this action is different, given that we sit in Habeas review, and cannot grant Bobadilla's Petition unless the Minnesota Supreme Court's application of *Crawford* was objectively unreasonable. Accordingly, our Court of Appeals' decision, in *Bordeaux,* does not compel us to grant Bobadilla's requested relief. We observe only that the Minnesota Supreme Court considered the decision of our Court of Appeals, in *Bordeaux,* and its disposition of a multi-purpose statement, but nonetheless, concluded that, "where preservation for trial is merely incidental to other purposes, such as assessing and responding to an immediate danger, a statement will not be deemed testimonial." *Bobadilla II,* supra at 252 [citation omitted].

We next acknowledge that a Court in this District has concluded, in the context of an analogous Petition for Habeas relief, that it would violate *Crawford* to admit, at Trial, a videotaped CornerHouse interview – similar to the CPW's interview of T.B., which is at issue here – unless the defendant had a prior opportunity to cross-examine the witness. See, *Danforth v. Crist,* 2005 WL 2105502 at *2 (D. Minn., August 26, 2005). Nonetheless, that statement by the *Danforth* Court was dicta, given that the Court ultimately denied Habeas relief, after concluding that *Crawford* did not have retroactive applicability to the petitioner's collateral challenge. *Id.* at *1. Accordingly, the *Danforth* Court had no occasion to consider whether a

State Court's application of *Crawford* was reasonable, or unreasonable, for purposes of Habeas review, which is the issue we consider here. As a consequence, we do not find the conclusion in *Danforth* dispositive in this action.

Here, the Minnesota Supreme Court observed that it "determine[d] whether statements were testimonial on a case-by-case basis, especially given the uncertainty surrounding Confrontation Clause issues following *Crawford*." *Bobadilla II,* supra at 250. Since the *Crawford* Court had declined to define what constitutes a "testimonial statement," the Minnesota Supreme Court considered both the purpose of the declarant, and the purpose of the interviewer, among other related factors, after noting that, according to *Crawford,* the Confrontation Clause was intended to protect against both "scheming declarants," and "corrupt government officials." *Id.*, citing *Crawford v. Washington,* supra at 44. The Minnesota Supreme Court also concluded that its multi-factor analysis was consistent with other Courts, from other jurisdictions, which were struggling to develop a workable definition of "testimonial," after *Crawford. Id.* at 250-51.

The Minnesota Supreme Court acknowledged that "statements taken by nonpolice-officer government officials could be testimonial." *Id.* at 252 n. 5, citing *Crawford v. Washington,* supra at 66. It further acknowledged that "courts in several jurisdictions have held that the statements of children in interviews conducted by social workers or police investigators are testimonial." *Id.* at 253. Nonetheless, it

found those cases factually distinguishable. For example, in *State v. Mack,* 101 P.3d 349, 352 (Or. 2004), the Oregon Supreme Court concluded that a human-services worker "was serving as a proxy for the police," and in *In re T.T.,* 815 N.E.2d 789, 802 (Ill. App. 2004), the Illinois Court of Appeals determined that a family-services interviewer was acting "with an eye toward prosecution." See, *Bobadilla II,* supra at 253 n. 6. In contrast, the Minnesota Supreme Court concluded that, because the interview, here, occurred within the context of Minnesota Statutes Section 626.556, "neither the [CPW] nor the child declarant, T.B., were acting, to a substantial degree, in order to produce a statement for trial." *Id.* at 254. Instead, as previously noted, the Court found that the interview had an "overriding purpose" of "assessing and responding to imminent risks to T.B.'s health and welfare." *Id.* at 255.

We conclude that the Minnesota Supreme Court's determination was not objectively unreasonable, in light of *Crawford.* As noted, the *Crawford* Court expressly declined to provide any definition of "testimonial," but instead, left the issue open for development by lower Courts. The Minnesota Supreme Court considered the purpose of both the declarant, and the interviewer, which was, at that time, in accord with the approach of several other jurisdictions. *Id.* at 250-51 (summarizing cases). Similarly, in *Crawford,* the Supreme Court identified "statements that declarants would reasonably expect to be used prosecutorially," and "statements that were made under circumstances

which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," as potential categories of "testimonial" statements. See, *Crawford v. Washington,* supra at 51-52 [citations omitted]. This section of the *Crawford* Court's analysis supports the Minnesota Supreme Court's consideration of the declarant's purpose – here, T.B. In addition, the *Crawford* Court spent considerable time outlining the historical "investigative and prosecutorial function" of magistrates, and their modem counterparts, the police, who acted as interrogators. *Id.* at 53. This prong of analysis lends credence to the Minnesota Supreme Court's consideration of the interviewer's purpose – here, the CPW.

The Minnesota Supreme Court found that the CPW's primary function, under Minnesota Statutes Section 626.556, was to protect T.B.'s health and welfare. Bobadilla argues that *Crawford* applies not only to police officers, but to "social workers, child protection workers, or other government workers," who examine suspects, or witnesses, before Trial. See, *Petitioner's Memorandum in Support,* supra at 10. Although the *Crawford* Court expressed concern about one-sided interrogations by "government officers," it used that term in connection with the "investigative and prosecutorial function" of police, which supports the Minnesota Supreme Court's decision to focus on the function, or purpose, of the interview. See, *Crawford v. Washington,* supra at 53. Moreover, the Minnesota Supreme Court did not

dispute that an interview by a social worker, or other government official, could, in some cases, be "tantamount to police interrogations, and therefore testimonial." See, *Bobadilla II* supra at 254. Nonetheless, here, the Minnesota Supreme Court concluded that neither the interviewer, nor the declarant, acted with the purpose of producing a statement for Trial, and that determination is not objectively unreasonable.[10] *Id.* Indeed, the Minnesota Supreme Court observed that "[t]he parties do not dispute that the interview of T.B. was conducted in accord with" Minnesota Statutes Section 626.556. *Id.*

Bobadilla also argues that the Minnesota Supreme Court unreasonably refused to extend the

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[10] We reject the Respondent's argument that the Minnesota Supreme Court made a finding of fact with respect to either T.B.'s purpose, or the CPW's purpose, in conducting the interview. See, *Respondent's Memorandum in Support,* supra at 17. At no point in its analysis does the Minnesota Supreme Court cite to the Trial transcript, in order to ferret out the CPW's subjective purpose for conducting the interview. Instead, as noted in the text of this Opinion, the Court focused solely on the objective purpose of a child-protection worker, when that worker acts within the scope of Minnesota Statutes Section 626.556. See, *Bobadilla II,* supra at 254-56. Moreover, given Bobadilla's position, that the *Crawford* standard is an objective one, we similarly reject his implicit request that we find, based on' the CPW's testimony, that she had the 'subjective intention of acting as the police department's "pawn," "mouthpiece," or agent. See, *Petitioner's Memorandum in Support,* supra at 22. We consider only whether the Minnesota Supreme Court's application of *Crawford,* to the facts presented, was objectively unreasonable.

holding in *Crawford,* from police interrogations, to an interview by a forensically trained child-protection worker. See, *Petitioner's Reply,* supra at 12. "[A] state court's decision involves an unreasonable application of Supreme Court precedent when the state court 'identifies the correct governing legal rule from [the Supreme] Court's cases but * * * either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Moore v. Purkett,* 275 F.3d 685, 688 (8th Cir. 2001), quoting *Williams v. Taylor,* supra at 407.

We acknowledge, as did the Minnesota Supreme Court, that a police officer was present when the CPW conducted her interview of T.B. See, *Bobadilla II,* supra at 247. However, the Minnesota Supreme Court observed that the State statute required coordination between the child welfare agency, and law enforcement. *Id.* at 254. The Court also observed that "[a]voiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions." *Id.* at 255. Moreover, as previously noted, the Court found that, "[i]f part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental [* * * .]" *Id.* Again, because we find that the Minnesota Supreme Court reasonably

applied the precedent of *Crawford*, in determining that the CPW did not act with the substantial purpose of producing a statement for Trial, we reject Bobadilla's argument in this respect.

We emphasize that it is not our province to determine, anew, whether T.B.'s videotaped statements were testimonial – for that is not our role within the constrained scope of Habeas review. Accordingly, finding no merit in Bobadilla's Petition for Habeas relief, we recommend, therefore, that the Petition be denied.

NOW, THEREFORE, It is –

RECOMMENDED:

That the Petition for a Writ of Habeas Corpus [Docket No. 1] be denied.

Dated: March 25, 2008 /s/ Raymond L. Erickson
Raymond L. Erickson
CHIEF U.S.
MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D. Minn. LR1.1(f), and D. Minn. LR72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than April 11, 2008**, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply

with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing **by no later than April 11, 2008**, unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. §636 to review the transcript in order to resolve all of the objections made.

STATE OF MINNESOTA

IN SUPREME COURT

A03-1891

Court of Appeals

Anderson, Russell, A., C.J.
Dissenting, Page, J.
Took no part, Gildea, J.

State of Minnesota,

Appellant,

vs.

Filed: February 9, 2006
Office of Appellate Courts

Orlando Manuel Bobadilla,

Respondent.

SYLLABUS

Statements by a young child in a risk-assessment interview conducted by a child-protection worker in accordance with the statutory scheme outlined in Minn. Stat. § 626.556 (2004) were not testimonial when neither the child nor the child-protection worker were acting, to a substantial degree, in order to produce statements for use at trial. Therefore, the admission of these statements at trial without having afforded the defendant an opportunity for cross-examination did not violate the defendant's rights under the Confrontation Clause of the United States Constitution.

Affirmed in part, reversed in part, and judgment of conviction reinstated.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, Russell A., Chief Justice.

Orlando Manuel Bobadilla was convicted of first-degree criminal sexual conduct and sentenced to 144 months in prison following a jury trial in Kandiyohi County. On appeal, the court of appeals reversed his conviction and remanded for a new trial, concluding that, pursuant to *Crawford v. Washington,* 541 U.S. 36 (2004), the admission at trial of statements by a young child in a risk-assessment interview conducted by a child-protection worker had violated Bobadilla's rights under the Confrontation Clause of the United States Constitution. We conclude that the child's statements were not testimonial in nature, and that Bobadilla was not otherwise deprived of a fair trial. We therefore reverse the court of appeals' decision to remand for a new trial, and reinstate Bobadilla's conviction.

On Friday afternoon, May 2, 2003, 3-year-old T.B. was dropped off by his mother for a weekend visit with his father, who was then residing with several relatives, including T.B.'s uncle, 23-year-old respondent Orlando Bobadilla. T.B.'s mother worked

a 3:00 p.m.-11:00 p.m. shift on weekends, and following the end of her shift on Sunday, May 4, 2003, she picked up T.B. sometime after 11:00 p.m.

As T.B.'s mother was readying T.B. for bed and changing his pull-up diaper, she "noticed that his bottom was a little red" and asked him what had happened. He became nervous and started playing with his hair. She told him that she was his mother and that he could tell her anything. T.B. then told her that "his Uncle Orlando had put his finger in his 'booty,'" T.B.'s word for buttocks. T.B.'s mother said "okay," finished changing him, and sent him off to his room. She then phoned T.B.'s father and reported what T.B. had said. After hearing of T.B.'s story, T.B.'s grandmother decided that they should take him to the hospital. As T.B. and his mother were waiting to be picked up to go to the hospital by T.B.'s father and grandmother, T.B.'s mother asked him if he had asked Bobadilla to stop. T.B. indicated that he had, and that Bobadilla had said he was sorry.

T.B.'s parents brought T.B. into the hospital's emergency room where he was examined by an emergency-room physician. After talking to T.B.'s parents, the physician conducted a full-body examination of T.B., and observed an abnormal erythema, or redness, around his rectum. The physician saw no ulcerations or lesions, which would have indicated a chronic problem, and believed the erythema was consistent with what the child had disclosed.

A Willmar Police Department officer was dispatched to the hospital on an assault report. The officer initially met with the emergency room nurse and then with T.B.'s parents. After doing so, the officer forwarded his report to both the Investigations Unit of the police department and the Kandiyohi County Family Service Department. Over the next several days, a Kandiyohi County child-protection worker from the Family Service Department tried a number of times to contact T.B.'s mother by phone, finally connecting with her on May 9, 2003. The child-protection worker arranged to have T.B. interviewed that day at the law enforcement center.

T.B. and his parents arrived at the law enforcement center at approximately 1:30 p.m. The child-protection worker and a Willmar police detective, out of uniform, met the family and escorted them to the interview room. The interview room, called the "child friendly room," was specifically used for interviewing children and featured a video camera that recorded the exchange from behind a one-way mirror. The detective did not participate in the interview, but observed, sitting across from the child-protection worker and T.B. The child-protection worker conducted the interview using the CornerHouse protocol, which she described as a technique "specifically geared towards interviewing children who have been victims of sexual abuse." The protocol consists of establishing rapport with the child, ascertaining the child's terms for parts of the anatomy, ascertaining whether abuse occurred, and closing with a "safety

message." The CornerHouse technique instructs the interviewer to ask nonleading questions, to use terms children would understand, and to progress quickly since young children have short attention spans.

The child-protection worker began the interview by asking T.B. about his parents and she then drew pictures of them. Next, using a diagram of a male, she had T.B. identify his names for various parts of the anatomy, starting with the head and moving down. Then the following exchange occurred:

> Child-Protection Worker: [H]as anybody hurt your body?
>
> T.B.: Mmm, MmmMmm (affirmative)
>
> CPW: Yeah. Who hurt your body?
>
> T.B.: Orlando did.
>
> CPW: Orlando did * * * How did Orlando hurt your body?
>
> T.B.: He (inaudible) my (inaudible).
>
> CPW: What?
>
> T.B.: He, he (inaudible) touch my (inaudible).
>
> CPW: (inaudible) your bootie. Okay. What did he do to your bootie?
>
> T.B.: (inaudible) put his finger in there.
>
> CPW: He just put his finger in there? Okay * * * .

T.B. then identified what he meant by "booty" by pointing to the buttocks area on the diagram the child-protection worker had provided.

The child-protection worker asked T.B. where he and Bobadilla were at the time of the incident, and T.B. said they were in his father's room. She asked where his father was while it happened. T.B. said that his father had gone downstairs and then come upstairs, but he also said "yeah" when asked if his father had seen it happen. Then the child-protection worker asked him if he would show her what had happened using an anatomically correct doll. He said he would, but ultimately did not. She also asked if Orlando touched him on his skin or on his clothes, and T.B. replied, "My skin." The child-protection worker then closed the interview by telling T.B. that what had happened was not okay, and that he should tell someone, like his mother, if something similar ever happened again.

Bobadilla was charged with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2004) (engaging in sexual penetration with another person under 13 years of age when the actor is more than 36 months older than the complainant), and second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2004) (engaging in sexual contact with another person under 13 years of age when the actor is more than 36 months older than the complainant).

At trial, the district court found T.B. incompetent to testify, but ruled that his statements to his mother and his statements in the child-protection interview were sufficiently reliable to permit their admission as substantive evidence under the hearsay exception embodied in Minn. Stat. § 595.02, subd. 3 (2004). Therefore, the court allowed T.B.'s mother and the child-protection worker to testify about T.B.'s statements, and also allowed the state to show the videotape of T.B.'s interview. In addition to the evidence of T.B.'s statements, the emergency-room physician testified regarding her medical examination of T.B. T.B.'s father also testified, stating that he left his son alone with Bobadilla for only seconds when he went downstairs to retrieve the family cat, but that he might have told police that he was gone for 5 minutes or so. The detective testified that Bobadilla, in his police interview, said that T.B.'s father was gone for 15-20 minutes looking for the cat. Bobadilla testified on his own behalf and denied the allegations of sexual misconduct.

The jury found Bobadilla guilty as charged. The district court entered judgment of conviction for the first-degree criminal sexual conduct charge and imposed the 144-month presumptive sentencing guidelines term, together with 5 years of conditional release. On appeal, Bobadilla challenged certain evidentiary rulings and argued that T.B.'s statements in the child-protection interview were testimonial statements and therefore the admission of those statements without a prior opportunity for

cross-examination violated his constitutional right of confrontation under the United States Supreme Court's decision in *Crawford,* which had been decided while his appeal was pending. 541 U.S. 36. Though the court of appeals rejected Bobadilla's other arguments, the court agreed that his right of confrontation had been violated, and therefore reversed his conviction and remanded the matter for a new trial. We granted the state's petition for review.

I.

The Confrontation Clause of the United States Constitution ensures that a criminal defendant "shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. Art. 1, § 6. Prior to the United States Supreme Court's decision in *Crawford,* an unavailable witness's out-of-court statement would not violate the Confrontation Clause if the statement fell under a hearsay exception, and if it bore "particularized guarantees of trustworthiness," or "adequate indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 66 (1980); *see State v. Hansen,* 312 N.W.2d 96, 102 (Minn. 1981). The *Crawford* court rejected this approach, concluding that "[r]eliability is an amorphous, if not entirely subjective, concept." 541 U.S. at 63. The Court explained:

> [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

> The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61. Accordingly, *Crawford* explained that the Confrontation Clause should be interpreted as a procedural, rather than a substantive guarantee, aimed at curbing abuses that were inherent in "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford,* 541 U.S. at 50, 61. In light of this procedural focus, *Crawford* instructs that the right of confrontation attaches not to judicially determined "reliable" statements, but to all statements by "witnesses against the accused – in other words, those who bear testimony." *Id.* at 51 (quotation marks omitted). Thus, *Crawford*'s Confrontation Clause test bars at trial all "testimonial" out-of-court statements when the accused is not afforded "a prior opportunity to cross-examine" the declarant. *Crawford,* 541 U.S. at 61. In this case, it is undisputed that T.B. was not subject to cross-examination, and so our sole inquiry under the Confrontation Clause is whether T.B.'s statements in the interview with the child-protection worker were "testimonial" under *Crawford.*

The *Crawford* Court determined that the case before it presented a clearly testimonial situation. *See* 541 U.S. at 53 n.4. Crawford and his wife were both given *Miranda* warnings and separately interrogated

by police officers after Crawford had stabbed a man who had allegedly raped his wife. *Id.* at 38. Crawford's wife observed the stabbing and her statements describing the incident to the police officers were introduced in her husband's trial under the statements-against-penal-interest exception to the hearsay rule, since her statements tended to show that she had a role in facilitating the assault. *Id.* at 38-40.

The *Crawford* Court considered the wife's statement – a "recorded statement, knowingly given in response to structured police questioning" – to be clearly testimonial, but "refus[ed] to articulate a comprehensive definition" of testimonial statements. *Id.* at 53 n.4, 68 n.10. The Court listed three formulations of testimonial statements, though it declined to choose among them:

> 1. *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
>
> 2. extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
>
> 3. statements that were made under circumstances which would lead an

> objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (internal citations, quotation marks, and ellipses omitted; numbering added).

Though it is unclear whether any of these three formulations are authoritative, *Crawford* explained that all three "share a common nucleus" of testimonial statements, which includes, "at a minimum * * * prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and * * * police interrogations."[1] *Id.* at 52, 68. The *Crawford* Court also explained that a testimonial statement "is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (quotation marks omitted). Therefore, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51.

As interpreted by *Crawford,* the Confrontation Clause is aimed at protecting against abuses by both declarants and government questioners. *See Crawford,* 541 U.S. at 44, 56 n.7, 67. *Crawford*

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[1] The Court acknowledged that various definitions of "interrogations" exist, but declined to clarify further, explaining that there was no need to reach a more precise definition since the facts before it clearly qualified as an interrogation under any possible definition. *Crawford*, 541 U.S. at 53 n.4.

explains that the Framers wrote the Clause not only in consideration of scheming declarants like the infamous Lord Cobham, who was allowed to present self-serving and uncross-examined testimony in the trial of Sir Walter Raleigh, but also in consideration of corrupt government officials, explaining that "[the Framers] knew that * * * government officers[ ] could not always be trusted to safeguard the rights of the people." *Crawford,* 541 U.S. at 44, 67. The *Crawford* Court observes that the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Id.* at 56 n.7.

We have dealt extensively with testimonial statements under *Crawford* once previously. In *State v. Wright,* we held that a 911 call reporting an assault and a police interview with the assault victims, conducted soon after the incident, were both non-testimonial. 701 N.W.2d 802, 804, 815 (Minn. 2005). However, we explained that we would determine whether statements were testimonial on a case-by-case basis, especially given the uncertainty surrounding Confrontation Clause issues following *Crawford. Wright,* 701 N.W.2d at 812. In making the determination that the statements at issue in *Wright* were not testimonial, we articulated eight relevant considerations:

> (1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or

> the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded.

Id. at 812-13. The second and seventh factors – the purpose of the statements from the perspective of the declarant and from the perspective of the government questioner – were the central considerations. *See id.* at 811, 813-14. The other six factors are probative of these two. We believe that *Wright*'s focus on the purpose of the statements from the perspectives of both the declarant and the government questioner is consonant with *Crawford*'s concern with abuses by both declarants and government questioners.

Our approach in *Wright* is consistent with the approach of numerous other courts that have also determined that the testimonial question turns on whether government questioners or declarants take or give a statement "with an eye toward trial." *Crawford,* 541 U.S. at 56 n.7. For example, when the facts indicate that both a government questioner and a declarant are, to a substantial degree, acting with an eye toward trial, courts have consistently held that the declarant's statements are testimonial. *See,*

e.g., United States v. Saner, 313 F.Supp.2d 896, 901-02 (S.D. Ind. 2004) (deciding that incriminating statements made to an investigating prosecutor were testimonial); *People v. Zarazua,* No. H025472, 2004 WL 837914, *4 (Cal. Ct. App. 6th Dist. Apr. 20, 2004) (determining that an adult rape and assault victim's videotaped statement to police at the police station was testimonial); *People v. Vigil,* 104 P.3d 258, 262-63 (Colo. Ct. App. 2004) (determining that a statement by a 7-year-old declarant during a police interrogation was testimonial where the child understood the punitive consequences of his statements), *cert. granted,* 2004 WL 2926003 (Colo. Dec. 20, 2004); *see also Crawford,* 541 U.S. at 51 (stating that "[a]n accuser who makes a formal statement to government officers bears testimony"). In the converse situation, when both a questioner and a declarant are not, to any substantial degree, acting with an eye toward trial, courts have consistently held that the declarant's statements are not testimonial, as we did in *Wright.*[2] 701 N.W.2d at 813-14. Most courts have

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[2] *See Hammon v. State*, 829 N.E.2d 444, 457-58 (Ind. 2005) (deciding that a wife's statements to officers investigating a domestic abuse report were not testimonial where neither the police nor the wife were principally motivated by a desire to preserve the wife's statements for trial); *People v. Griffin*, 93 P.3d 344, 372 n.19 (Cal. 2004) (determining that a victim's statement to a friend at school indicating that defendant had abused her was not testimonial); *Demons v. State*, 595 S.E.2d 76, 79-80 (Ga. 2004) (determining that a victim's statement to a coworker that the defendant had threatened to kill her was not testimonial); *State v. Barnes*, 854 A.2d 208, 211 (Me. 2004)

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also determined that a statement is testimonial if a government questioner is acting largely for the purpose of preserving a statement for trial, even if the declarant is not. *E.g., United States v. Bordeaux,* 400 F.3d 548, 556 (8th Cir. 2005) (deciding that a statement was testimonial when a young child was interviewed for the purpose of collecting information for law enforcement), *reh'g en banc denied* (May 27, 2005); *State v. Mack,* 101 P.3d 349, 352 (Or. 2004) (same); *People ex rel. R.A.S.,* 111 P.3d 487, 498 (Colo. Ct. App. 2004) (same).[3]

(determining that statements by mother seeking "safety and aid" from police were not testimonial); *People v. Moscat*, 777 N.Y.S.2d 875, 879-80 (N.Y. City Crim. Ct. 2004) (determining that a typical 911-call situation is not testimonial because the declarant is essentially crying out for help, "not contemplating being a 'witness' in future legal proceedings," and that the government is similarly not "in contemplation of pursuing criminal charges against a particular person"); *People v. Garrison*, 109 P.3d 1009, 1011 (Colo. Ct. App. 2004) (determining that a murder victim's statements to her manager that the defendant was harassing her were not testimonial), *cert. denied*, 2005 WL 878563 (Colo. Apr. 18, 2005); *Herrera-Vega v. State*, 888 So.2d 66, 69 (Fla. Dist. Ct. App. 2004) (determining that a child's statements to parents reporting a "touching" were not testimonial), *review denied*, 902 So.2d 790 (Fla. 2005). *See also Crawford*, 541 U.S. at 51, explaining that "a person who makes a casual remark to an acquaintance does not" bear testimony.

[3] We note that a few courts have at least suggested that the declarant's perspective is the dispositive factor in the testimonial analysis, and that the perspective of the questioner, even a government questioner, is essentially irrelevant. *See, e.g., United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)

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Often, government questioners and declarants will have multiple purposes. But the fact that a statement is given or taken partially for reasons other than preservation for trial does not preclude a determination that the statement is testimonial. *E.g.*, *Bordeaux*, 400 F.3d at 556 (stating that "*Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial"). For instance, a police officer will often be acting, to at least some degree, with an eye toward trial, even when responding to an emergency. But where preservation for trial is merely incidental to other purposes, such as assessing and responding to an immediate danger, a statement will not be deemed testimonial. *See, e.g.*, *Hammon*, 829 N.E.2d at 458 (statement was not testimonial where an officer taking a statement

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(deciding a case involving statements made to confidential informants and determining, in dicta, that "the proper inquiry * * * is whether the declarant intends to bear testimony against the accused"); *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004) (deciding that statements made to undercover officers were not testimonial, and speculating that "the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony"), *cert. denied*, 125 S. Ct. 938 (2005); *and see generally* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243, 251 (Winter 2002) (advocating a declarant-centered approach to Confrontation Clause analysis). However, in *Wright* we rejected an approach that did not consider both the perspective of the government questioner and the perspective of the declarant. *See* 701 N.W.2d at 811-14. We do not think that an approach that makes the declarant's perspective dispositive gives adequate consideration to *Crawford*'s fear of governmental abuses. *See* 541 U.S. at 56 n.7, 67.

"was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene"). Our decision in *Wright* provides an instructive example. In *Wright,* we acknowledged that officers at the scene were acting at least to some degree with an evidence-gathering purpose, but observed that, nonetheless, the officers' actions were primarily "a response to a call for assistance and preliminary determination of 'what happened' and whether there was immediate danger, rather than an effort to gather evidence for a future trial." *Id.* at 813-14. Thus, producing evidence for trial must be at least a substantial purpose of the statement.[4]

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[4] The observation that producing a statement for trial must be at least a substantial purpose of a testimonial statement can also be inferred from courts' disparate treatment of similar factual situations. *Compare Lopez v. State*, 888 So.2d 693, 699-700 (Fla. Dist. Ct. App. 2004) (determining that an excited utterance made at the scene of a crime was testimonial where the declarant making the statement to a police officer knew that his statement would be used at trial, explaining that the key was "the purpose for which the statement was made"); *with Hammon*, 829 N.E.2d at 456-58 (determining that an excited utterance made at the scene of a crime was not testimonial where neither the police officer taking the statement nor the declarant were "principally motivated by a desire to preserve the statement" for trial). Similarly, *compare State v. Powers*, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (determining that a 911 call was testimonial where the purpose of the call was mainly to report a crime, not to gain urgent assistance), *with Moscat*, 777 N.Y.S.2d at 879-80 (determining that a 911 call was not testimonial where the declarant's principal purpose was crying out for help, and where the declarant was "not contemplating being a 'witness' in future legal proceedings").

These decisions, our own decision in *Wright,* and *Crawford* itself all instruct us that the key to determining whether a statement is testimonial is whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial.[5] *See especially Hammon,* 829 N.E.2d at 456 (concluding that "if either [a declarant or questioner] is principally motivated by a desire to preserve the statement [for use at a future trial] it is sufficient to render the statement 'testimonial,'" and determining that "development 'with an eye toward trial' is in our view the critical component" of determining whether a statement is testimonial under *Crawford*).

Whether a declarant or government questioner is acting, to a substantial degree, in order to produce a

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[5] Like many *Crawford* issues, it remains a lively question whether the Confrontation Clause is concerned with statements made to government officers only, or with statements between any questioners or declarants who are acting "with an eye toward trial." Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 518 (Jan. 2005). In this case, we do not need to address whether statements not involving government officers may be testimonial, and so we express no opinion on this question.

But it is clear that, at least in some situations, statements taken by non-police-officer government officials could be testimonial. *See Crawford*, 541 U.S. at 66 (stating that "[t]he Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers").

statement for trial is determined by asking whether a reasonable government questioner or declarant in the relevant situation would exhibit that purpose. We make this inquiry, as opposed to an inquiry into the subjective motivations of declarants or questioners, because *Crawford* explained that "only cross-examination" can reveal a declarant's subjective perception of his or her situation. 541 U.S. at 66. In addition, this approach is consistent with our reasoning in *Wright,* in which we looked to the likely motivations of reasonable people in the relevant situations, *see* 701 N.W.2d at 811, 813-14, but rejected an inquiry that hinged on the perspective of an objectively situated person who was unaffected by the context in which the statement was made, *see id.* at 814. In so doing, we explained that the latter approach would be overbroad, and would improperly ignore statements' "interrogative qualities," or the contextual aspects of the questioning. *Id.* Finally, we note that an inquiry into the purpose of a reasonable government questioner or declarant in the relevant situation also conforms with *Crawford*'s core categories of testimonial statements – "prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and * * * police interrogations" – since a reasonable questioner taking a statement in any one of those situations would always exhibit a substantial concern with producing a statement for use in legal proceedings. 541 U.S. at 68.

II.

In the context of child-declarant cases, courts in several jurisdictions have held that the statements of children in interviews conducted by social workers or police investigators are testimonial. We note that the facts of many of these cases can be distinguished from the present situation. *See, e.g., Snowden,* 846 A.2d at 39-41, 47 (finding the statements of 10- and 8-year-old children to be testimonial when the statements were taken pursuant to a statute that allows the admission at trial of children's out-of-court statements regardless of whether the children are incompetent or unavailable to testify). Moreover, as with other cases in which testimonial questions arise, these cases have consistently determined that children's statements are testimonial in situations where either the declarant or government questioner was acting, to a substantial degree, in order to produce a statement for trial.[6] Using a similar

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[6] *See, e.g., Bordeaux*, 400 F.3d at 556 (stating that "the purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement"); *People v. Warner*, 14 Cal.Rptr.3d 419, 429 (Cal. Ct. App. 3d Dist. 2004) (holding that a child's statements in an interview with a trained child-interview specialist were testimonial where one of the purposes of the interview was "as an investigative tool for criminal prosecutions"), *rev. granted on other grounds*, 97 P.3d 811 (Cal. 2004); *In re T.T.*, 815 N.E.2d 789, 802 (Ill. Ct. App. 2004) (determining that statements by a child to a family-services interviewer were testimonial where the interviewer was acting "with an eye toward prosecution"); *Mack*, 101 P.3d at 352 (holding that statements made by a child

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rationale, several courts have considered the statements of children to social workers or police officers to be tantamount to police interrogations, and therefore testimonial. *E.g., T.P. v. State,* 911 So.2d 1117, 1123 (Ala. Crim. App. 2004) (stating that "because [an interview of a child by a social worker] was intended to be used as an investigative tool for a potential criminal prosecution, the interview is similar to a police interrogation and, thus, falls within the definition of 'testimonial' contained in *Crawford*"), *cert. denied* (Ala. Mar. 11, 2005). As we noted above, we think it is reasonable to conclude that in any situation tantamount to a "police interrogation" under *Crawford,* the government questioner taking the statement would be acting, to a substantial degree, in order to produce a statement for trial.

But in this case, neither the child-protection worker nor the child declarant, T.B., were acting, to a substantial degree, in order to produce a statement

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to a human-services worker were testimonial where the human-services worker "was serving as a proxy for the police"); *Purvis v. State*, 829 N.E.2d 572, 579 (Ind. Ct. App. 2005) (holding that statements of a child to an officer were testimonial because "[t]he rationale of the rule in *Crawford* is to exclude from evidence statements that have not been cross-examined that were gathered for the purpose of use at a later trial"). *See also* Mosteller, 39 U. Rich. L. Rev. at 538 (examining post-*Crawford* cases and observing that statements made by children to child-protection workers were determined to be testimonial when the evidence showed that "the government was purposefully creating formalized statements for potential use at trial").

for trial. The parties do not dispute that the interview of T.B. was conducted in accord with a statutory scheme for reporting, investigating, and responding to threats to children's health or welfare. Minn. Stat. § 626.556 (2004). This statutory scheme provides that certain individuals must report the maltreatment of minors either to law enforcement or to the local welfare agency. *Id.* Following a report of abuse, "the local welfare agency shall immediately conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." Minn. Stat. § 626.556, subd. 10(a). To the extent that an allegation of abuse alleges a violation of a criminal statute, the local welfare agency and law enforcement must "coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews." *Id.* Both the welfare agency and law enforcement must prepare separate reports. *Id.* The local welfare agency is required to use a "nondirective" question-and-answer format and to make audio-video recordings of the interviews of alleged victims of sexual abuse. Minn. Stat. § 626.556, subd. 10(j)(2).

The clearly delineated purpose of this statutory scheme is to protect the health and welfare of children:

> [T]he public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse. In furtherance of this public policy, it is the intent of the legislature under this section to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings; and to provide, when necessary, a safe temporary or permanent home environment for physically or sexually abused or neglected children.
>
> In addition, it is the policy of this state to require the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings; to provide for the voluntary reporting of abuse or neglect of children; to require the assessment and investigation of the reports; and to provide protective and counseling services in appropriate cases.

Minn. Stat. § 626.556, subd. 1. This statute stands in contrast to statutes such as the Maryland statute at issue in *Snowden*. 846 A.2d 36. In *Snowden,* the court found an interview testimonial where the statutory interviewing scheme was designed with the express purpose of facilitating the creation of out-of-court statements for a future trial. *Id.* at 47.

Avoiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions. That, by statute, the initial risk-assessment interview is recorded does not, therefore, necessarily indicate that the purpose of the interview was to create a formalized statement for trial. Given the clear need to limit a child's exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child, there is a compelling need for a single recorded assessment interview solely in order to best protect the health and welfare of the child.[7]

Here, the interview of T.B. was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child. In the interview, the child-protection worker established rapport with T.B., identified the child's

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[7] We also find it somewhat unlikely that *Crawford*'s aim was to discourage the recording of these statements. In fact, "mechanical recording, if done fully and well, may eliminate" concerns of governmental manipulation of witnesses' statements. Mosteller, 39 U. Rich. L. Rev. at 571. Further, "[w]hen statements are accurately recorded in their entirety, then manipulation of what was said is not possible * * * [and] this particular concern is not eliminated – but exacerbated – by the failure to record the statement when it is made." *Id.*

terms for human anatomy, made a touch and abuse inquiry, and closed the interview. If part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to T.B.'s health and welfare. Much like the at-the-scene police questioning in *Wright,* the interview of T.B. "represent[s] a response to a call for assistance and preliminary determination of 'what happened' and whether there was immediate danger, rather than an effort to gather evidence for a future trial." 701 N.W.2d at 813-14. Moreover, given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial. As amicus American Prosecutors Research Institute makes clear, children of T.B.'s age are simply unable to understand the legal system and the consequences of statements made during the legal process.

Certainly, communications in initial-assessment interviews may very well evolve into testimonial statements. An interview with an older child who understands the law-enforcement consequences of his statement, or an interview with more significant law-enforcement involvement might both exhibit a greater purpose on the part of a declarant or government questioner to produce statements for use at a future trial. *See, e.g., Vigil,* 104 P.3d at 262-63 (determining that a statement was testimonial where the court indicated that the child understood the punitive consequences of his statements); *R.A.S.*, 111 P.3d at

488, 490 (determining that a child's statement was testimonial where the child was interviewed by an investigating police officer 3 days after an abuse incident). But we conclude that in this case, neither T.B. nor the child-protection worker were acting, to a substantial degree, in order to produce a statement for trial, and therefore T.B.'s statements in the assessment interview were not testimonial.

III.

Bobadilla also challenges certain evidentiary rulings made by the district court. Evidentiary rulings are committed to the trial court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Bjork*, 610 N.W.2d 632, 636 (Minn. 2000). And reversal is not warranted unless there is a reasonable doubt that the result would have been different had the evidence not been admitted. *State v. Martin,* 695 N.W.2d 578, 583 (Minn. 2005) (citing *State v. Litzau,* 650 N.W.2d 177, 182 (Minn. 2002)).

First, Bobadilla argues that even aside from Confrontation Clause issues there were not sufficient "indicia of reliability" to admit T.B.'s interview statements. *Hansen*, 312 N.W.2d at 102. *A* court must consider "the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made" in determining whether there are sufficient indicia of reliability under Minn. Stat.

§595.02, subd. 3.[8] Here, the trial court articulated several sound factors on which it relied in deciding to admit T.B.'s statements. Specifically, the court noted: (1) that the statement was made close in time to the event; (2) that the statement was unusual and consistent with T.B.'s prior reporting; (3) that the questions were not leading or suggestive; and (4) that neither the interviewer nor the detective had any reason to lie. We therefore conclude that the district court did not abuse its discretion by determining that the statements met the statutory requirements of reliability.

Second, Bobadilla contends that the testimony of the child-protection worker and the detective concerning the content of the videotaped interview with T.B. was needlessly cumulative under Minn. R. Evid. 403. However, the detective was not permitted to testify about the content of the interview, the child-protection worker's testimony was received without objection, and error, if any, was harmless given that the jury saw the videotape itself.

Finally, Bobadilla asserts that the district court committed error by excluding exculpatory statements contained in his police statements. He argues that his consistent denials of the allegations were admissible

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[8] "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68.

as prior consistent statements under Minn. R. Evid. 801(d)(1)(B). The rule requires the speaker to be subject to cross-examination at trial. At the time the court ruled on the state's motion in limine, the cross-examination requirement had not been satisfied. Again error, if any, in the exclusion of the exculpatory statements was harmless, particularly where the jury heard of his consistent denials through the testimony of his brother.

In summary, we hold that statements made by a young child in a risk-assessment interview conducted by a child-protection worker in accordance with the statutory scheme outlined in Minn. Stat. § 626.556 were not testimonial when neither the child nor the child-protection worker were acting, to a substantial degree, in order to produce a statement for trial. We also hold that Bobadilla was not deprived of a fair trial by the district court's evidentiary rulings.

Affirmed in part, reversed in part, and judgment of conviction reinstated.

GILDEA, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

DISSENT

PAGE, Justice (dissenting).

I respectfully dissent. The court's conclusion that T.B.'s out-of-court statements were not testimonial and therefore not admitted at trial in violation of Bobadilla's Sixth Amendment right to confront the witnesses against him is error. That conclusion is error because T.B.'s statement was a statement made as part of a police interrogation, in the presence of a police officer, to a government official who was taking the statement as a surrogate interviewer for the police.

In *Crawford v. Washington,* the United States Supreme Court, while not giving guidance as to what constitutes a testimonial statement, stated unequivocally that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Crawford v. Washington,* 541 U.S. 36, 52 (2004). The *Crawford* Court was also concerned with statements given to government officers: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. This is because government officers "could not always be trusted to safeguard the rights of the people." *Id.* at 44, 67. Similarly, "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Id.* at 56 n.7. Moreover, the Supreme Court specifically

stated that "interrogations by law enforcement officers fall squarely" within the concerns of the Sixth Amendment and expressed doubt as to the existence of "neutral" government officers. *Id.* at 53, 66.

According to the record, T.B.'s out-of-court statement was taken as part of an interview set up by a county child-protection worker at the request of a Willmar police detective. The interview took place at the Kandiyohi Law Enforcement Center and was conducted pursuant to Minn. Stat. § 626.556, subd. 10(a) (2004), which requires that, upon receipt of a report of a "violation of a criminal statute involving sexual abuse * * * the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews."[9]

T.B.'s statements generated by the interview fit squarely within *Crawford's* pronouncement that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Crawford,* 541 U.S. at 52. With respect to the child-protection worker's involvement, the statements constitute "a formal statement" to a government official and amount to "testimony in a

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[9] Under a plain reading of this statutory language, it is clear that the "investigation" referred to is the police investigation and that the "assessment" referred to is the one being conducted by the social welfare agency.

sense that * * * a casual remark to an acquaintance does not." *Id.* at 51. While it is true that part of the purpose of the child-protection worker in conducting the interview was to assess T.B.'s need for treatment and protection, it cannot be ignored that another equally important purpose was to act as a surrogate interviewer for the corresponding police investigation.

Other courts have found that police involvement in scenarios factually similar to this case gave rise to testimonial statements. *See, e.g., State v. Snowden,* 867 A.2d 314 (Md. 2005) (holding statements given by children to a social worker were testimonial when police initiated social worker's participation, requested that the interview take place, were actively involved in the investigation, and the identity of the suspect was known); *see also, e.g., T.P. v. State*, No. CR-03-0574, 2004 WL 2418045 (Ala. Crim. App. Oct. 29, 2004) (holding statements made to child-protection worker while police officer was present were testimonial), *cert. denied* (Mar. 11, 2005); *People v. Sisavath,* 118 Cal. App. 4th 1396 (Cal. Ct. App. 2004) (holding when interview occurred after prosecution began and prosecutor was present during the interview, statements made to interviewer were testimonial), *review denied* (Sept. 15, 2004); *People v. Warner,* 14 Cal. Rptr. 3d 419 (Cal. Ct. App. 2004) (determining interview was testimonial when a detective observed and one of the interview's purposes was use as an investigative tool for prosecutions), *petition for review on other grounds granted*, 97 P.3d 811 (2004); *Somervell v. State,* 883 So.2d 836 (Fla. Dist. Ct.

App. 2004) (deciding statement of autistic child given to a police officer at a child advocacy center was testimonial); *In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. Ct. 2004) (holding statements made to a child-protection worker while police officer observed through one-way glass were testimonial), *appeal pending* (January Term 2005); *State v. Mack*, 101 P.3d 349 (Or. 2004) (holding interview with protective services, arranged by police officers with police officers present, was testimonial).[10] Like many of these cases, the investigation in this case had already started, the police were involved before the interview occurred, the identity of the suspect was known, the police initiated the interview and were involved in coordinating the interview, a police officer was present at the interview, and this was the only interview of T.B. conducted by the police as a result of their effort to comply with Minn. Stat. § 626.556, subd. 10(a). Simply put, the interview here was intended to facilitate the police investigation.

Thus, T.B.'s statement as given to the child-protection worker and the Willmar police detective was per se testimonial under any definition of the term.

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[10] But compare cases in which medical personnel, and not government officers or police officers, were in charge of taking the statement – some of these cases hold that statements to medical professionals are nontestimonial due to the medical purpose of the interview. *See, e.g.*, *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004); *State v. Fisher*, 108 P.3d 1262 (Wash. Ct. App. 2005).

Although I conclude that T.B.'s statement was testimonial under any definition of that term, I nonetheless feel compelled to comment on the court's analysis in concluding that the statement was nontestimonial.

As support for its claim that T.B.'s statement was nontestimonial, the court makes an analogy to *State v. Wright*, 701 N.W.2d 802 (Minn. 2005). In *Wright*, we concluded that statements made to police officers during on-scene police questioning following a 911 call were nontestimonial. The circumstances leading to the statement in this case are clearly distinguishable from the police questioning in *Wright*. In *Wright*, the police interviews at issue occurred when the police responded to a 911 call placed by the victims of a domestic assault. The victims were interviewed on the scene immediately after the assault occurred. *Id.* at 813. As such, the facts in *Wright* supported a conclusion that the victims' statements were not testimonial because the police were responding "to a call for assistance" and making a "preliminary determination of 'what happened' and whether there was immediate danger, rather than an effort to gather evidence for a future trial." *Id.* at 813-14.

That is not what happened here. Here, while T.B. was examined by a doctor at the hospital on Sunday, May 4, 2003, he was not interviewed by either the police or child-protection personnel until Friday, May 9, 2003, at the law enforcement center. Thus, there was no exigency here as there was in *Wright*. Moreover, because section 626.556, subdivision 10(a), gave

the police only one opportunity to question T.B. directly, the questioning had to serve two functions: preliminary fact-finding and the collection of evidence for a future trial. Because of those distinguishing facts, there is nothing in the *Wright* analysis that causes T.B.'s statement to become nontestimonial.

The court also relies on section 626.556, subdivision 10(a), for support, contending that T.B.'s interview was conducted for the purpose of child protection and that the method chosen was consistent with the legislative intent underlying that section. The court further contends that any law enforcement purpose in participating in the interview was incidental to the child-protection purpose. The record before us belies these contentions. The record is clear that the child-protection worker arranged T.B.'s interview at the request of the Willmar police, that the interview took place at the law enforcement center, that a police detective was present during the interview, and that the interview was conducted to facilitate the police investigation, as well as assess the child's need for protective services.

The court states: "Given the clear need to limit a child's exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child, there is a compelling need for a single recorded assessment interview." But the issue here is not the fact that the interview took place or even the manner in which the interview was conducted. The issue is whether the statements T.B. made during the interview were admissible at trial when T.B. was

unavailable to testify and not subject to cross-examination. While the interview here was, in part, conducted for the purpose of protecting the health and welfare of the child, that purpose does not change the fact that the police involvement in requesting and participating in the interview was solely for the purpose of collecting potential evidence for a future trial.

In its effort to support the conclusion that the purpose of section 626.556 is to protect the health and welfare of the child, the court attempts to distinguish the factually similar Maryland case, *Snowden*. In *Snowden*, a Maryland statute allowed social workers to interview children suspected of having been the victim of sexual abuse and then, under certain circumstances, testify in place of the child using statements obtained during the interview. *Snowden*, 867 A.2d at 321. The *Snowden* court held that these statements were testimonial. *Id.* at 330. The facts of *Snowden* are virtually indistinguishable from the facts in this case. The social worker in *Snowden* became involved in the case only after the police investigation had begun and only at the behest of law enforcement. *Id.* at 326-27. The police were present during the interview, which took place in a "[c]ounty-owned and operated facility unfamiliar to the children and used for the purpose of investigating and assessing victims of child abuse." *Id.* at 327. Similarly, here, the child-protection worker only became involved after she was contacted by a police detective, a police officer was present during the interview, and the

interview took place at the law enforcement center, in a child-friendly room unfamiliar to T.B., which was specifically designed for interviewing children alleged to have been abused. The only significant difference between the two statutes is that Minn. Stat. § 626.556, subd. 10(a), does not expressly authorize the admission of the statements obtained during interviews in a subsequent trial.

Thus, while it is true, as the court states, that the express purpose behind the statute in *Snowden* was to prepare testimony for possible use at a future trial, in the end the situation here is not substantially different. Section 626.556, subdivision 10(a), requires that a child sexual abuse victim be interviewed only once and that "the local law enforcement agency and local welfare agency * * * coordinate the planning and execution of their *respective investigation* and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews." (Emphasis added.) Because of the limitations of section 626.556, subdivision 10, the joint interview of T.B. was law enforcement's only opportunity to develop testimony from T.B. for possible later use at trial. T.B.'s statements were used in court against Bobadilla in the same manner that the statement in *Snowden* was used against that defendant. Here, as in *Snowden*, "[t]he interview questions posed by [the child-protection worker], and the responses elicited, were in every way the functional equivalent of the formal police questioning discussed in *Crawford* as a prime example of what may be considered testimonial."

Snowden, 867 A.2d at 325. Like the testimonial statements in *Snowden,* T.B.'s statements are also testimonial.

Because the child-protection worker and police detective worked in conjunction with one another and conducted a joint interview of T.B. pursuant to section 626.556, subdivision 10(a), and because T.B. was unavailable at trial and Bobadilla had no opportunity to cross examine T.B., admission of T.B.'s statements at trial constitute a per se violation of Bobadilla's Sixth Amendment rights. While the statute itself is not unconstitutional, the admission of T.B.'s statements obtained pursuant to the statute is unconstitutional.

Finally, the court states that "in this case, neither T.B. nor the child-protection worker were acting, to a substantial degree, in order to produce a statement for trial, and therefore T.B.'s statements in the assessment interview were not testimonial." This statement is more than a little troubling in that it assumes that the only government actor involved in T.B.'s interviews was the child-protection worker. That assumption, however, is not supported by the record. The statement wholly ignores the Willmar Police Department's request for and participation in T.B.'s interviews.

In its opinion, the court eloquently articulates the need to, and importance of, protecting children. On

the facts of this case, that important need conflicts with the Sixth Amendment, which, under our system of justice, must prevail.

Therefore, I dissent.

Supreme Court of the United States
Orlando M. BOBADILLA, petitioner,
v.
MINNESOTA.
No. 05-11698.

Oct. 10, 2006.

Petition for writ of certiorari to the Supreme Court of Minnesota denied.

Select Provisions of Minn. Stat. § 626.556 (2002), Reporting of Maltreatment of Minors

Subdivision 1. Public policy. The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse. In furtherance of this public policy, it is the intent of the legislature under this section to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings; and to provide, when necessary, a safe temporary or permanent home environment for physically or sexually abused or neglected children.

In addition, it is the policy of this state to require the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings; to provide for the voluntary reporting of abuse or neglect of children; to require the assessment and investigation of the reports; and to provide protective and counseling services in appropriate cases.

Subd. 2. Definitions. As used in this section, the following terms have the meanings given them unless the specific content indicates otherwise:

(a) "Sexual abuse" means the subjection of a child by a person responsible for the child's care, by a person who has a significant relationship to the child, as defined in section 609.341, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a

violation of section 609.342 (criminal sexual conduct in the first degree), 609.343 (criminal sexual conduct in the second degree), 609.344 (criminal sexual conduct in the third degree), 609.345 (criminal sexual conduct in the fourth degree), or 609.3451 (criminal sexual conduct in the fifth degree). Sexual abuse also includes any act which involves a minor which constitutes a violation of prostitution offenses under sections 609.321 to 609.324 or 617.246. Sexual abuse includes threatened sexual abuse.

(b) "Person responsible for the child's care" means (1) an individual functioning within the family unit and having responsibilities for the care of the child such as a parent, guardian, or other person having similar care responsibilities, or (2) an individual functioning outside the family unit and having responsibilities for the care of the child such as a teacher, school administrator, other school employees or agents, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, babysitting whether paid or unpaid, counseling, teaching, and coaching.

(c) "Neglect" means:

(1) failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child's physical or mental health when reasonably able to do so;

(2) failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health when reasonably able to do so;

(3) failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care;

* * *

(d) "Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825.

* * *

(e) "Report" means any report received by the local welfare agency, police department, county sheriff, or agency responsible for assessing or investigating maltreatment pursuant to this section.

* * *

(i) "Assessment" includes authority to interview the child, the person or persons responsible for the child's care, the alleged perpetrator, and any other person

with knowledge of the abuse or neglect for the purpose of gathering the facts, assessing the risk to the child, and formulating a plan.

* * *

Subd. 3. Persons mandated to report. (a) A person who knows or has reason to believe a child is being neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff if the person is:

(1) a professional or professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement; or

* * *

The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency or agency responsible for assessing or investigating the report, orally and in writing. The local welfare agency, or agency responsible for assessing or investigating the report, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing. The county sheriff and the head of every local welfare agency, agency responsible for assessing or investigating reports, and police department shall each

designate a person within their agency, department, or office who is responsible for ensuring that the notification duties of this paragraph and paragraph (b) are carried out. Nothing in this subdivision shall be construed to require more than one report from any institution, facility, school, or agency.

(b) Any person may voluntarily report to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff if the person knows, has reason to believe, or suspects a child is being or has been neglected or subjected to physical or sexual abuse. The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency or agency responsible for assessing or investigating the report, orally and in writing. The local welfare agency or agency responsible for assessing or investigating the report, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing.

* * *

(d) Any person mandated to report shall receive a summary of the disposition of any report made by that reporter, including whether the case has been opened for child protection or other services, or if a referral has been made to a community organization, unless release would be detrimental to the best interests of the child. Any person who is not mandated to report shall, upon request to the local welfare agency, receive a concise summary of the disposition of any

report made by that reporter, unless release would be detrimental to the best interests of the child.

(e) For purposes of this subdivision, "immediately" means as soon as possible but in no event longer than 24 hours.

* * *

Subd. 6a. Failure to notify. If a local welfare agency receives a report under subdivision 3, paragraph (a) or (b) and fails to notify the local police department or county sheriff as required by subdivision 3, paragraph (a) or (b), the person within the agency who is responsible for ensuring that notification is made shall be subject to disciplinary action in keeping with the agency's existing policy or collective bargaining agreement on discipline of employees. If a local police department or a county sheriff receives a report under subdivision 3, paragraph (a) or (b) and fails to notify the local welfare agency as required by subdivision 3, paragraph (a) or (b), the person within the police department or county sheriff 's office who is responsible for ensuring that notification is made shall be subject to disciplinary action in keeping with the agency's existing policy or collective bargaining agreement on discipline of employees.

Subd. 7. Report. An oral report shall be made immediately by telephone or otherwise. An oral report made by a person required under subdivision 3 to report shall be followed within 72 hours, exclusive of weekends and holidays, by a report in writing to the appropriate police department, the county sheriff, the

agency responsible for assessing or investigating the report, or the local welfare agency, unless the appropriate agency has informed the reporter that the oral information does not constitute a report under subdivision 10. Any report shall be of sufficient content to identify the child, any person believed to be responsible for the abuse or neglect of the child if the person is known, the nature and extent of the abuse or neglect and the name and address of the reporter. If requested, the local welfare agency or the agency responsible for assessing or investigating the report shall inform the reporter within ten days after the report is made, either orally or in writing, whether the report was accepted for assessment or investigation. Written reports received by a police department or the county sheriff shall be forwarded immediately to the local welfare agency or the agency responsible for assessing or investigating the report. The police department or the county sheriff may keep copies of reports received by them. Copies of written reports received by a local welfare department or the agency responsible for assessing or investigating the report shall be forwarded immediately to the local police department or the county sheriff.

* * *

Subd. 10. Duties of local welfare agency and local law enforcement agency upon receipt of a report. (a) If the report alleges neglect, physical abuse, or sexual abuse by a parent, guardian, or individual functioning within the family unit as a person responsible for the child's care, the local welfare agency shall

immediately conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible. If the report alleges a violation of a criminal statute involving sexual abuse, physical abuse, or neglect or endangerment, under section 609.378, the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews. Each agency shall prepare a separate report of the results of its investigation. In cases of alleged child maltreatment resulting in death, the local agency may rely on the fact-finding efforts of a law enforcement investigation to make a determination of whether or not maltreatment occurred. When necessary the local welfare agency shall seek authority to remove the child from the custody of a parent, guardian, or adult with whom the child is living. In performing any of these duties, the local welfare agency shall maintain appropriate records.

If the assessment indicates there is a potential for abuse of alcohol or other drugs by the parent, guardian, or person responsible for the child's care, the local welfare agency shall conduct a chemical use assessment pursuant to Minnesota Rules, part 9530.6615. The local welfare agency shall report the determination of the chemical use assessment, and

the recommendations and referrals for alcohol and other drug treatment services to the state authority on alcohol and drug abuse.

* * *

(c) Authority of the local welfare agency responsible for assessing the child abuse or neglect report, the agency responsible for assessing or investigating the report, and of the local law enforcement agency for investigating the alleged abuse or neglect includes, but is not limited to, authority to interview, without parental consent, the alleged victim and any other minors who currently reside with or who have resided with the alleged offender.

* * *

(h) The local welfare agency or the agency responsible for assessing or investigating the report shall collect available and relevant information to ascertain whether maltreatment occurred and whether protective services are needed. Information collected includes, when relevant, information with regard to the person reporting the alleged maltreatment, including the nature of the reporter's relationship to the child and to the alleged offender, and the basis of the reporter's knowledge for the report; the child allegedly being maltreated; the alleged offender; the child's caretaker; and other collateral sources having relevant information related to the alleged maltreatment. The local welfare agency or the agency responsible for assessing or investigating the report may make a determination of no maltreatment early

in an assessment, and close the case and retain immunity, if the collected information shows no basis for a full assessment or investigation.

Information relevant to the assessment or investigation must be asked for, and may include:

(1) the child's sex and age, prior reports of maltreatment, information relating to developmental functioning, credibility of the child's statement, and whether the information provided under this clause is consistent with other information collected during the course of the assessment or investigation;

(2) the alleged offender's age, a record check for prior reports of maltreatment, and criminal charges and convictions. The local welfare agency or the agency responsible for assessing or investigating the report must provide the alleged offender with an opportunity to make a statement. The alleged offender may submit supporting documentation relevant to the assessment or investigation;

(3) collateral source information regarding the alleged maltreatment and care of the child. Collateral information includes, when relevant: (i) a medical examination of the child; (ii) prior medical records relating to the alleged maltreatment or the care of the child maintained by any facility, clinic, or health care professional and an interview with the treating professionals; and (iii) interviews with the child's caretakers, including the child's parent, guardian, foster parent, child care provider, teachers, counselors, family members, relatives, and other persons

who may have knowledge regarding the alleged maltreatment and the care of the child; and

(4) information on the existence of domestic abuse and violence in the home of the child, and substance abuse.

Nothing in this paragraph precludes the local welfare agency, the local law enforcement agency, or the agency responsible for assessing or investigating the report from collecting other relevant information necessary to conduct the assessment or investigation.

* * *

(i) In the initial stages of an assessment or investigation, the local welfare agency shall conduct a face-to-face observation of the child reported to be maltreated and a face-to-face interview of the alleged offender. The interview with the alleged offender may be postponed if it would jeopardize an active law enforcement investigation.

(j) The local welfare agency shall use a question and answer interviewing format with questioning as nondirective as possible to elicit spontaneous responses. The following interviewing methods and procedures must be used whenever possible when collecting information:

(1) audio recordings of all interviews with witnesses and collateral sources; and

(2) in cases of alleged sexual abuse, audio-video recordings of each interview with the alleged victim and child witnesses.

* * *

Subd. 10a. Abuse outside family unit. If the report alleges neglect, physical abuse, or sexual abuse by a person responsible for the child's care functioning outside the family unit in a setting other than a facility as defined in subdivision 2, the local welfare agency shall immediately notify the appropriate law enforcement agency, which shall conduct an investigation of the alleged abuse or neglect. The local welfare agency shall offer appropriate social services for the purpose of safeguarding and enhancing the welfare of the abused or neglected minor.

* * *

Subd. 10e. Determinations. Upon the conclusion of every assessment or investigation it conducts, the local welfare agency shall make two determinations: first, whether maltreatment has occurred; and second, whether child protective services are needed. * * * Determinations under this subdivision must be made based on a preponderance of the evidence and are private data on individuals or nonpublic data as maintained by the commissioner of children, families, and learning.

(a) For the purposes of this subdivision, "maltreatment" means any of the following acts or omissions:

(1) physical abuse as defined in subdivision 2, paragraph (d);

(2) neglect as defined in subdivision 2, paragraph (c);

(3) sexual abuse as defined in subdivision 2, paragraph (a);

* * *

(b) For the purposes of this subdivision, a determination that child protective services are needed means that the local welfare agency has documented conditions during the assessment or investigation sufficient to cause a child protection worker, as defined in section 626.559, subdivision 1, to conclude that a child is at significant risk of maltreatment if protective intervention is not provided and that the individuals responsible for the child's care have not taken or are not likely to take actions to protect the child from maltreatment or risk of maltreatment.

* * *

Individual counties may implement more detailed definitions or criteria that indicate which allegations to investigate, as long as a county's policies are consistent with the definitions in the statutes and rules and are approved by the county board. Each local welfare agency shall periodically inform mandated reporters under subdivision 3 who work in the county of the definitions of maltreatment in the statutes and

rules and any additional definitions or criteria that have been approved by the county board.

* * *